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STANFORD LAW LIBRARY

THE

TRIAL

OF

ANDREW M'KINLEY,

BEFORE

THE HIGH COURT OF JUSTICIARY, AT EDINBURGH,

ON THE 26TH JULY, 1817,

FOR

ADMINISTERING UNLAWFUL OATHS:

WITH

THE ANTECEDENT PROCEEDINGS AGAINST WILLIAM EDGAR, JOHN KEITH, AND ANDREW M'KINLEY.

TAKEN IN SHORT HAND,

By JOHN DOW, Esq. W.S.

EDINBURGH:

PRINTED FOR MANNERS AND MILLER, EDINBURGH;

AND SOLD BY

LONGMAN, HURST, REES, ORME, AND BROWN,

LONDON.

1818.

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of ALLOWAY.

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NOTICE BY THE PUBLISHERS.

THE Publishers are aware that a period unusually long has elapsed between the date of the trials and the publication of this Report. This delay, however, has been unavoidable; and from the intervening diminution of popular curiosity, will be chiefly or solely injurious to themselves. The cause and the justification of it will be found in their anxiety to render the report of these interesting proceedings accurate and authentic, by obtaining the revisal of the account of the opinions delivered from the Bench, and of the pleadings at the Bar. The principal delay occurred in obtaining the revisal of the pleadings for the pannels. In one instance,* one of the learned counsel for the pannels declined to revise the proof-sheets of the notes of the pleadings, and it was thought better to omit the speech altogether. With the exception of this omission, the following Report may be relied on as full and correct.

The short-hand writer stated it to be his intention to prefix a preface, for the purpose of explaining certain circumstances which occur-

* See Proceedings of 26th May, page 2.

red after the date of the trials, and in which he considered himself to be interested. After waiting for this prefatory notice for some time, in vain, the Publishers did not think themselves warranted in any longer withholding the publication on that account.

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THE

TRIAL

OF

WILLIAM EDGAR, &c.

FOR

ADMINISTERING UNLAWFUL OATHS.

PRESENT.

Right Hon. DAVID BOYLE, *Lord Justice Clerk.*
LORD HERMAND. | LORD PITMILLY.
LORD GILLIES. | LORD RESTON.

Counsel for the CROWN.

Right Hon. ALEXANDER MACONOCHIE, *Lord Advocate.*
JAMES WEDDERBURN, Esq. *Solicitor-General.*
H. HOME DRUMMOND, Esq. | H. WARRENDER, W.S. *Agent.*

Counsel for WILLIAM EDGAR.

JOHN CLERK, Esq. | FRANCIS JEFFREY, Esq.
GEO. CRANSTOUN, Esq. | J. P. GRANT, Esq.
THOS. THOMSON, Esq. | HENRY COCKBURN, Esq.
JAMES MONCRIEFF, Esq. | J. A. MURRAY, Esq.
G. W. BOYD, W. S. *Agent.*

WILLIAM EDGAR and JOHN KEITH were placed at the Bar.

LORD JUSTICE CLERK.—WILLIAM EDGAR and JOHN KEITH, Pay attention to the Indictment against you, which is now to be read.

"WILLIAM EDGAR and JOHN KEITH, both present prisoners in the Castle of Edinburgh, you are Indicted and Accused, at the instance of ALEXANDER MACONOCHIE of Meadowbank, his Majesty's Advocate, for his Majesty's

interest: That albeit, by an Act passed in the fifty-second year of his present Majesty's reign, entitled, "An Act to "render more effectual an Act passed in the thirty-seventh "year of his present Majesty, for preventing the Adminis- "tering or Taking Unlawful Oaths," it is *inter alia* enacted, "That every person who shall, in any manner or form "whatsoever, administer, or cause to be administered, or be "aiding or assisting at the administering, of any oath or "engagement, purporting or intending to bind the person "taking the same to commit any treason or murder, or any "felony punishable by law with death, shall, on conviction "thereof by due course of law, be adjudged guilty of felony, "and suffer death as a felon, without benefit of clergy." And further, by section fourth of the said Act, it is enacted, "That persons aiding and assisting at the administering of "any such oath and engagement, as aforesaid, and persons "causing any such oath or engagement to be administered, "though not present at the administering thereof, shall be "deemed principal offenders, and shall be tried as such; "and, on conviction thereof by due course of law, shall be "adjudged guilty of felony, and shall suffer death as felons, "without benefit of clergy; although the persons or person "who actually administered such oath or engagement, if "any ~~such there shall be, shall not have~~ been tried or con- "victed." And further, by section sixth of the said Act, it is enacted, "That any engagement or obligation whatso- "ever, in the nature of an oath, purporting or intending to "bind the person taking the same to commit any treason or "murder, or any felony punishable by law with death, shall "be deemed an oath within the intent and meaning of this "Act, in whatever form or manner the same shall be ad- "ministered or taken, and whether the same shall be ac- "tually administered by any person or persons to any other "person or persons, or taken by any other person or per- "sons, without any administration thereof by any other per- "son or persons:" Yet true it is and of verity, that you, the said William Edgar and John Keith, are both and each, or one or other of you, guilty of the said crimes, or of one or more of them, actors or actor, or art and part: In so far as you, the said William Edgar and John Keith, having, at Glasgow, and in the vicinity thereof, in the course of the months of November and December 1816, and of January and February 1817, wickedly, maliciously, and traitorously conspired and agreed with other evil disposed persons to break and disturb the public peace, to change, subvert, and overthrow the government, and to excite, move,

and raise insurrection and rebellion, and especially to hold and attend secret meetings, for the purpose of obtaining annual Parliaments and universal suffrage, by unlawful and violent means, did, then and there, both and each, or one or other of you, wickedly, maliciously, and traitorously administer, or cause to be administered, or did aid or assist at the administering, to a great number of persons, an oath or engagement, or an obligation in the nature of an oath, in the following terms, or to the following purport:—"In awful presence of God, I, A B, do voluntarily swear, That "I will persevere in my endeavouring to form a brotherhood of affection amongst Britons of every description, "who are considered worthy of confidence; and that I will "persevere in my endeavours to obtain for all the people in "Great Britain and Ireland, not disqualified by crimes or "insanity, the elective franchise, at the age of twenty-one, "with free and equal representation, and annual Parliaments; and that I will support the same to the utmost of "my power, either by moral or physical strength, as the "case may require: And I do further swear, that neither "hopes, fears, rewards, or punishments, shall induce me to "inform on, or give evidence against, any member or members, collectively or individually, for any act or expression done or made, in or out, in this or similar societies, "under the punishment of death, to be inflicted on me by "any member or members of such societies. So help me "God, and keep me stedfast." Which oath or obligation did thus purport or intend to bind the persons taking the same to commit treason, by effecting by physical force the subversion of the established government, laws, and constitution of this kingdom. And, more particularly, you, the said William Edgar and John Keith, did, upon the 1st day of January 1817, or on one or other of the days of that month, or of December immediately preceding, or of February immediately following, at a secret meeting, held for that and other unlawful purposes, in the house of William Leggat, change-keeper in King-street, Tradeston, in the vicinity of Glasgow, or elsewhere at Glasgow, or in the immediate vicinity thereof, both and each, or one or other of you, wickedly, maliciously, and traitorously administer, or cause to be administered, or did aid or assist at the administering an oath or obligation in the terms above set forth, or to the same purport, to Peter Gibson, John M'Lauchlane, John Campbell, and Hugh Dickson, all present prisoners in the Castle of Edinburgh; as also to James M'Ewan, now or lately carding-master at Humphries Mill, Gorbals

of Glasgow, and M'Dowal Pate, or Peat, now or lately weaver in Piccadilly-street, Anderston, in the vicinity of Glasgow, who, conscious of their guilt in the premises, have absconded and fled from justice; as also to John Connelton, now or lately cotton-spinner in Calton of Glasgow, or to one or other of them, and to other persons, whose names are to the Prosecutor unknown, the said oath or obligation, thus binding, or purporting to bind, the persons taking the same to commit treason, as said is. (2.) And further, you, the said William Edgar and John Keith, did, upon the 4th day of January 1817, or on one or other of the days of that month, or of December immediately preceding, or of February immediately following, at the house of Neill Munn, innkeeper and stabler in Ingram-street, Glasgow, or elsewhere at Glasgow, or in the immediate vicinity thereof, both and each, or one or other of you, wickedly, maliciously, and traitorously administer, or cause to be administered, or did aid or assist at the administering an oath or obligation, in the terms above set forth, or to the same purport, to the said Peter Gibson, John M'Lauchlane, John Campbell, Hugh Dickson, M'Dowal Pate, or Peat, and James M'Ewan; as also to James Hood, Andrew Sommerville, John Buchanan, and James Robertson, all present prisoners in the tolbooth of Glasgow, or to one or other of them, and to other persons, whose names are to the Prosecutor unknown, the said oath or obligation thus binding, or purporting to bind, the persons taking the same to commit treason, as said is. And you the said William Edgar having been apprehended and taken before Daniel Hamilton, Esquire, one of the Sheriffs-substitute of Lanarkshire, did, in his presence, at Glasgow, on the 6th day of March 1817, emit and subscribe a declaration; and having been taken before Robert Hamilton, Esquire, Sheriff-depute of Lanarkshire, you did, in his presence, at Glasgow, upon the 7th and 8th days of March 1817, emit and subscribe two several declarations: And you the said John Keith having been apprehended, and taken before the said Robert Hamilton, Esquire, did, in his presence, at Glasgow, on the 6th and 7th days of March 1817, emit and subscribe two several declarations: All which declarations, being to be used in evidence against each of you respectively, will be lodged in due time in the hands of the Clerk of the High Court of Justiciary, before which you are to be tried, that you may have an opportunity of seeing the same. At least, times and places foresaid, the said oath or engagement, or an oath or engagement to the same purport, was wickedly, mali-

ciously, and traitorously administered, or caused to be administered; and some persons did aid or assist at the administering thereof; and you the said William Edgar and John Keith are both and each, or one or other of you, guilty thereof, actors or actor, or art and part. All which, or part thereof, being found proven by the verdict of an Assize, before the Lord Justice General, the Lord Justice Clerk, and Lords Commissioners of Justiciary, you the said William Edgar and John Keith ought to be punished with the pains of law, to deter others from committing the like crimes in all time coming.

H. Home Drummond, *A. D.*

LIST OF WITNESSES.

1 Robert Hamilton, Esquire, Sheriff-depute of Lanarkshire.
2 Daniel Hamilton, Esquire, one of the Sheriffs-substitute of Lanarkshire.
3 Daniel M'Callum, clerk to John Drysdale, Sheriff-clerk of Lanarkshire.
4 Mathew Burns, clerk to George Salmond, Procurator-fiscal of Lanarkshire.
5 John Leslie, clerk to the said John Drysdale.
6 Joseph Reid, writer in Glasgow.
7 Alexander Calder, sheriff-officer in Glasgow.
8 James Thomson, clerk to the said John Drysdale.
9 Alexander Hunter, changekeeper, Old Wynd of Glasgow.
10 Marion M'Laren, or M'Lachlan, now or lately servant to the said Alexander Hunter.
11 John Robertson, innkeeper and stabler, Gallowgate, Glasgow.
12 Agnes Campbell, wife of Thomas Dow, steam-boiler maker and smith at Girdwood and Company's foundry in Hutchesontown, in the vicinity of Glasgow.
13 Janet Rentoul, now or lately servant to Neill Munn, innkeeper and stabler in Ingram-street, Glasgow.
14 Alison Wilson, now or lately servant to the said Neill Munn.
15 Mathew Fyfe, spirit-dealer in Wilson-street, Glasgow.
16 Jean Boyd, wife of the said Mathew Fyfe.
17 William Leggat, changekeeper in King-street, corner of Centre-street, Tradeston, in the vicinity of Glasgow.

18 Hugh Dickson, present prisoner in the Castle of Edinburgh.
19 Peter Gibson, present prisoner there.
20 John M'Lachlane, present prisoner there.
21 William Simpson, present prisoner there.
22 James Hood, present prisoner in the tolbooth of Glasgow.
23 John Campbell, present prisoner in the Castle of Edinburgh.
24 Thomas Sinclair, present prisoner there.

H. Home Drummond, *A. D.*

LIST OF ASSIZE.

County of Edinburgh.

Francis Carteret Scott of Ballerno.
Richard Wooley of Whitehouse.
James White, tobacconist in Dalkeith.
Robert Lyle, baker there.
5 John Wood, merchant there.
John Brown, farmer, Carrington.
Andrew Johnston, farmer, Primrosebarns.

County of Haddington.

William Aicheson, junior, of Drummore.
John Sommervill of Moreham.
10 William Hay, farmer, Howden.
John Brodie, farmer, West Fenton.
Robert Hope, farmer, Fenton.

County of Linlithgow.

William Glen of Mains.
William Dawson, younger, Bonnytoun.
15 John Trotter, farmer at Stacks.
Robert Taylor, residing at Blackness.
George Turnbull, farmer at Northbank.

City of Edinburgh.

Robert Fraser, jeweller in Edinburgh.
Thomas Richardson, merchant-tailor there.
20 David Whitelaw, watch-maker there.
Peter Peddie, trunk-maker there.
William Trotter, upholsterer there.
Alexander Russell, coach-maker there.
John Inverarity, upholsterer there.
25 George Yule, merchant there.

Alexander Ainslie, saddler there.
John Steel, confectioner there.
James Innes, gunsmith there.
Daniel Forrest, hosier there.
Peter Sawers, saddler there.
George Hunter, merchant there.
William Ross, tailor there.
Charles M'Lean, draper there.
John Laing, saddler there.
John M'Pherson, tailor there.
Francis Davidson, confectioner there.
William Cooper, boot-maker there.
William Dumbreck, hotel-keeper there.

Town of Leith.

John M'Kenzie, merchant in Leith.
Archibald Cleghorn, corn-merchant there.
Thomas Morton, ship-builder there.
Robertson Paterson, painter there.
Charles Robertson, merchant there.
John Sanders, agent there.
John Glover, wright there.

AD. GILLIES.
D. MONYPENNY.
DAVID DOUGLAS.

LORD ADVOCATE.—From certain circumstances, I find it proper to move the Court to desert the diet against John Keith *pro loco et tempore*. He will therefore be committed to prison upon a new warrant.

[This motion was accordingly agreed to.]

LORD JUSTICE CLERK.—William Edgar, What do you say to this Indictment?—Are you guilty or not guilty of the charges contained in it?

WILLIAM EDGAR.—Not guilty, my Lord.

MR CRANSTOUN.—I am of Counsel in this case for the prisoner at the bar. The indictment, which your Lordships have just heard read, charges the prisoner with a capital crime, that of administering an oath purporting or intending to bind the takers to commit the crime of treason.

My Lords, this is not a point of dittay recognized by the ancient and common law of Scotland; neither the nature of

the offence itself, nor the manner in which it is to be charged, is pointed out by any precedents or authorities familiar to your Lordships. It is a charge introduced by a special statute, and recently introduced; and, so far as I know, no trials have taken place hitherto upon that statute in Scotland, and according to your forms.

It will be admitted, that this crime is of a nature peculiarly delicate. The life of the prisoner at the Bar may depend on the construction to be put on words alone, without reference to overt acts by which they may receive a clear and unambiguous interpretation. To administer an oath without judicial authority is perhaps not a very commendable practice; and in a moral point of view it may sometimes be improper, as tending to lessen the obligation of an oath, when thus applied to frivolous or improper subjects, or on frivolous and improper occasions. But, my Lords, at the same time, it is not in itself an illegal thing—it is prohibited by no law; and I understand and am well informed that it is a common and daily practice. It is practised in many associations and fraternities; for example, in masonic meetings, when there is not the least intention on the part, either of the persons who administer, or of the persons who take the oath, on the one part to impose, or on the other to undertake an unlawful obligation. To make a common practice of this nature the ground of a capital punishment, when the guilt or innocence of the act depends on the interpretation of the mere words used, may appear not perhaps altogether in unison with the mild and equitable spirit of British jurisprudence. Your Lordships are well acquainted with the statute I. Mary, chap. 1st, which swept away from the law that mass of constructive treasons by which it had been previously polluted—a statute held by the nation at the time it was enacted, as one of the greatest blessings ever conferred by the Legislature, and still looked up to by their posterity with admiration and gratitude. Though constructive treason was thus abolished, yet the statute upon which the present indictment is founded tends to introduce a capital felony, which, though not punished as treason, is yet punished with death, the *ultimum supplicium* of the law.

This statute was no doubt passed at a time when bands of armed men were committing every species of atrocity, when they were burning, robbing, and murdering, and in particular when they were compelling persons by force to swear oaths, unquestionably and clearly imposing an obligation to commit felonies. In this state of things, a speedy and

efficacious remedy was necessary; and no doubt this statute was passed with the best intentions, and may have been productive of the most salutary consequences. All this being allowed, yet considered as a standing rule, incorporated in the criminal law of Scotland, and applied to other occasions than those contemplated by the Legislature, it was not perhaps penned with all the caution requisite, and may involve principles which it would not be very safe to admit permanently into our system of jurisprudence. But it is not your Lordships' province to judge of the merits of the enactment, and far less am I entitled to pronounce an opinion upon that subject. It makes part of the statute law of Scotland, and that is enough. But although I am not entitled to inquire into the expediency of the law, it is my right, and it is my duty, to inquire in what manner the words of it shall be construed—in what manner, being part of the criminal law of Scotland, it shall be applied and accommodated to our form of judicial proceedings. And after fully considering the subject in this more limited view, I trust I shall be able to satisfy your Lordships that the libel in this case is not relevant, according to the principles of the criminal law of Scotland. This is a subject of the utmost importance, and to which the attention of your Lordships is now most earnestly requested.

In this indictment the major proposition sets forth, that, "Albeit, by an act passed in the fifty-second year of his present Majesty's reign, entitled, 'An act to render more effectual an act passed in the thirty-seventh year of his present Majesty, for preventing the administering or taking unlawful oaths,' it is, *inter alia*, enacted, 'That every person who shall, in any manner or form whatsoever, administer, or cause to be administered, or be aiding or assisting at the administering of any oath or engagement, purporting or intending to bind the person taking the same to commit any treason or murder, or any felony punishable by law with death, shall, on conviction thereof by due course of law, be adjudged guilty of felony, and suffer death as a felon, without benefit of clergy.'" There are then other clauses of the statute recited in this major proposition.

With regard to the major proposition of this indictment, I have no objections to make to it. It is correct in reciting the clause of the act constituting the crime which is now to be tried; and, therefore, in considering this proposition, the only thing to be attended to is, the nature of the crime which is here stated to be punishable with death? It is the

administering an oath, "purporting or intending to bind the person taking the same to commit treason or murder, or any felony punishable with death."

Upon reading this clause, your Lordships will be satisfied, That it is not sufficient to constitute this crime that an oath was administered—it is not sufficient that the person administering that oath had criminal intentions at the time—or that he was engaged at the time in criminal practices—it is not enough that the person who takes the oath intends to commit, or is in the course of committing criminal practices. All that is insufficient to constitute the crime here set forth. It is necessary,—it is the essence of the crime, that the oath administered shall itself purport or intend to bind the taker to commit the crimes specified in the statute. It is quite possible that two persons may be actually engaged in committing the crime of treason, and while thus occupied, that one of them, with a view of practising a deceit on those who were present, and of ensnaring them into the traitorous conspiracy, should administer an oath to his associate, under the pretence of binding him to commit the treason. But if that oath did not in fact impose the obligation, it could not warrant a conviction under this statute. It might be an overt act of treason, and all the persons present, he who administered the oath, he who took the oath, and the spectators, might be punishable as traitors, yet still an indictment under the present statute could reach none of them; for to make the statute apply, it is essential that the oath administered purports or intends to bind the party taking it to commit treason or felony. An oath not containing that obligation, however nefarious and detestable in itself, may be the ground of a different prosecution, but it cannot be the ground of the charge now before your Lordships. All this is too clear to require any illustration; it must be manifest to every one who reads the words of the statute.

Having said thus much on the major proposition of the indictment, we now come to consider the minor proposition. Here, as in other cases, there are two subjects of inquiry; 1*st*, Whether the facts set forth in the minor amount to the charge in the major? and, 2*d*, Supposing that they do, whether they are specified with that precision and minuteness which are required, according to the law of Scotland, to constitute a relevant indictment?

The minor begins in these terms: "Yet true it is and of verity, that you, the said William Edgar and John Keith,

are both and each, or one or other of you, guilty of the said crimes, or of one or more of them, actors or actor, or art and part: In so far as you, the said William Edgar and John Keith, having, at Glasgow, and in the vicinity thereof, in the course of the months of November and December 1816, and of January and February 1817, wickedly, maliciously, and traitorously conspired and agreed, with other evil disposed persons, to break and disturb the public peace, to change, subvert, and overthrow the government, and to excite, move, and raise insurrection and rebellion, and especially to hold and attend secret meetings for the purpose of obtaining annual Parliaments and universal suffrage, by unlawful and violent means, did, then and there, both and each, or one or other of you, wickedly, maliciously, and traitorously administer, or cause to be administered, or did aid or assist at the administering, to a great number of persons, an oath or engagement, or an obligation in the nature of an oath, in the following terms, or to the following purport."—And then the words of the oath are recited.—"In awful presence of God, I, A B, do voluntarily swear, That I will persevere in my endeavouring to form a brotherhood of affection amongst Britons of every description, who are considered worthy of confidence; and that I will persevere in my endeavours to obtain for all the people in Great Britain and Ireland, not disqualified by crimes or insanity, the elective franchise, at the age of twenty-one, with free and equal representation, and annual Parliaments; and that I will support the same to the utmost of my power, either by moral or physical strength, as the case may require: And I do further swear, that neither hopes, fears, rewards, or punishments, shall induce me to inform on, or give evidence against, any member or members, collectively or individually, for any act or expression done or made, in or out, in this or similar societies, under the punishment of death, to be inflicted on me by any member or members of such societies. So help me God, and keep me stedfast." And it is said in the indictment, that this oath, or at least an oath of the same purport, was administered.

It is here set forth, that the prisoner at the bar was in the course of committing certain heinous crimes. These crimes, your Lordships will observe, are not laid as a substantive charge against the prisoner; and it is impossible that they should be so laid in this indictment, for a prisoner can be charged with nothing in the minor, but what amounts to the crime laid in the major proposition. It is said, that

the prisoner having committed those crimes, did administer the oath. But those crimes are not laid with a view to inflict punishment on him for them, though perhaps they are stated *in modum probationis* of another crime. It is incompetent in the minor proposition of the indictment to say that the prisoner is guilty of a felony not charged in the major, in order to punish him for that felony. The charge in this indictment is for administering an unlawful oath; and whatever facts connected with a separate crime are set forth in the minor only, they make no part of the charge against the prisoner at the bar. I trust I shall afterwards shew, though it is not at present the time to make inquiry into this, that however atrocious the crimes here affirmed to have been committed by the prisoner may be, as they are in themselves totally irrelevant to infer the crime with which he is really charged, so at the same time it is incompetent, according to the law of Scotland, to bring any proof of those crimes. This I shall postpone for after consideration, proceeding, in the mean time, to consider the oath which was administered, which is said to purport an obligation on the taker to commit treason.

The oath is in these words:—"In awful presence of God, I, A B, do voluntarily swear, That I will persevere in my endeavouring to form a brotherhood of affection amongst Britons of every description, who are considered worthy of confidence; and that I will persevere in my endeavours to obtain for all the people in Great Britain and Ireland, not disqualified by crimes or insanity, the elective franchise, at the age of twenty-one, with free and equal representation, and annual Parliaments; and that I will support the same to the utmost of my power, either by moral or physical strength, as the case may require: And I do further swear, that neither hopes, fears, rewards, or punishments, shall induce me to inform on, or give evidence against, any member or members, collectively or individually, for any act or expression done or made, in or out, in this or similar societies, under the punishment of death, to be inflicted on me by any member or members of such societies. So help me God, and keep me stedfast."—Then it is said, "Which oath or obligation did thus purport or intend to bind the persons taking the same to commit treason, by effecting by physical force the subversion of the established government, laws, and constitution of this kingdom."

Here the prosecutor recites the oath, and says that it purports an obligation on the person taking it to commit

treason, by effecting by physical force the subversion of the established government, laws, and constitution of this kingdom. But it is not enough that the prosecutor says it has that purport. If, on considering the oath itself, your Lordships are of opinion, that it does not imply what the prosecutor alleges, his mere averment that it is an oath of a certain purport will not make it so; and he is not entitled to have that question sent to the Jury, for that would be taking from the Court the question as to the relevancy of the indictment.

Suppose in an indictment for perjury, the prosecutor, after alleging in general terms that this specific offence has been committed, proceeds in the minor proposition to give the deposition of the prisoner in detail, and afterwards to contrast it with what he alleges to be the truth, asserting that there is such a manifest discrepancy as necessarily implies the commission of the crime charged—still his mere assertion on this subject will not be sufficient; and if the Court shall be satisfied, on comparing the alleged truth with the alleged falsehood, that there is not an absolute contradiction between them; in other words, that what the prisoner has sworn may be reconciled with what the prosecutor says he ought to have sworn, you will not hold the indictment to be relevant, nor send the charge to a Jury to be tried. That being the case, if your Lordships, on reading this oath, be of opinion, that it does not purport what the public prosecutor says it purports, then I say this is an irrelevant libel. It is true that, besides the word "purporting," there is another word used here, "intending." What is the signification of the word *intending* I shall afterwards consider, and it is of material importance to this case; but let us see, in the first place, what is the signification of the term *purport*. This term, as every body knows, is applied to denote the meaning of words as gathered from the words themselves—the meaning as *expressed* in contradistinction to the meaning which may be *conjectured* from extrinsic facts or circumstances. Look then at the words of the oath, and see if it purports what the prosecutor says it does. No man who reads it can say so. The words of the oath are, "I will persevere in my endeavouring to form a brotherhood of affection amongst Britons of every description, who are considered worthy of confidence." Nobody will pretend to say that there is an obligation to commit treason here. There is an obligation to form a brotherhood of affection. All the subjects of this country are brothers; and it is becoming that they should dwell together in

unity. This cannot purport any thing to be done that is improper. The oath then goes on, "That I will persevere in my endeavours to obtain for all the people of Great Britain and Ireland, not disqualified by crimes or insanity, the elective franchise, at the age of twenty-one, with free and equal representation, and annual Parliaments." There are few persons at present, who are qualified, either from their natural parts or information, to judge of subjects of this kind, who will be of opinion that either annual Parliaments or universal suffrage would be of advantage to the inhabitants of this country, or would conduce to any thing else than anarchy in the first instance, and despotism in the end. But although this is true, it is well known to your Lordships, that it is the privilege of every subject in this country, to form his own opinion on subjects of a political nature; and having formed his opinion, he may make use of lawful means to have such changes produced in the constitution or government of the country as he may think expedient. The Legislature has at different times altered the duration of Parliament and the mode of suffrage; and if any person believes that annual Parliaments and universal suffrage would be of benefit to the country, it is no crime to use lawful endeavours to obtain these objects, which can only be obtained lawfully by an act of the British Parliament itself; and you know, that petitions for such objects are daily presented to Parliament, and daily received.

It is said in the oath, "I will persevere" in these endeavours. If the endeavours are lawful, the persevering in them is no crime at all. It is not said in the oath, or in any part of the indictment, that the prisoner was engaged in unlawful projects for these purposes. It is said, indeed, in the indictment, that the persons who administered the oath were engaged in a treasonable conspiracy; but there is no specification of circumstances to evince the prisoner's accession to this conspiracy, nor is the offence of conspiracy any part of the substantive charge made against him in the indictment. That being the case, the oath or obligation to endeavour to obtain annual Parliaments and universal suffrage, is an obligation in itself perfectly innocent. Your Lordships will not say that these endeavours are unlawful, nor will you impute improper motives to the party in prosecuting them, for you are not authorized to make such an intendment. When a person promises to use every endeavour to accomplish an object, the generality of this expression will never extend it to unlawful endeavours,—it must

be construed with the common and necessary limitation, that he will use every endeavour which he may lawfully use. If this principle of construction were not adopted, the oath of Abjuration itself might be converted into an obligation to commit treason. "I do faithfully promise, to the utmost of my power, to support, maintain, and defend the succession of the Crown," purports, that I will support, maintain, and defend it by lawful means,—but not by unlawful means, not by felony, murder, or treason.

The oath in the indictment then goes on to say, "that I will support *the same* to the utmost of my power, either by moral or physical strength, as the case may require." Support what? Here is an ambiguity in the oath; and an ambiguity which shews how hazardous it is to admit constructive treasons reared upon words uttered by persons not critically acquainted with the imperfect instrument of language. Interpret this passage any way you chuse, it will not amount to any thing criminal. Even supposing that it binds the party taking the oath to obtain the objects which are specified in it by moral or physical force, what is the result? it is, that lawful objects are to be obtained by lawful measures. No person can be blamed for exerting his utmost efforts under that limitation. Or take the only other construction which can be put upon this clause of the oath, and suppose the party to swear, that he will support annual Parliaments and universal suffrage to the utmost of his power, *when these objects shall have been obtained*; that he will use his best endeavours to continue and perpetuate these imaginary blessings, when they shall once have been procured for the country. Is this an unlawful obligation? It certainly is not. If lawful objects are obtained in a lawful manner, then it is the duty of good subjects to support and continue them. So that whatever construction you put upon this clause of the oath, whether you suppose it to refer to enterprises for obtaining what does not already exist, or for supporting improvements after they shall be established by law, it is in either case perfectly innocent.—With regard to the terms "moral and physical strength," I may remark, a man may support what is lawful either by the one or the other, and yet be free from blame. The individuals attempting to procure annual Parliaments and universal suffrage, might employ their moral strength for that purpose by using arguments; or their physical strength, for instance, by being despatched with letters and messages, or going about to solicit Members of Parliament for their support. A person may erect hustings, and may keep off the rabble—he

may employ his physical force in twenty different ways, without doing any thing that is unlawful.

The oath concludes, "And I do further swear, that neither hopes, fears, rewards, or punishments, shall induce me to inform on, or give evidence against, any member or members, collectively or individually, for any act or expression done or made, in or out, of this or similar societies, under the punishment of death, to be inflicted on me by any member or members of such societies. So help me God, and keep me stedfast." I admit at once, it is improper for any person to undertake an obligation not to give evidence. But that is not an obligation to commit treason; it is only to commit a misdemeanor with which we have here no concern.

Not one of those clauses of the oath can support the major proposition in the indictment. Read the oath from beginning to end, and say, does it impose any obligation to commit treason? Read the words a hundred times over, and still it will be impossible to say that such is its purport. For it may be explained to mean an obligation to endeavour to obtain lawful objects, and cannot be explained fairly to mean any thing else. I am speaking of the purport of the oath, and not of what might be the intention of the parties at the time; and if that oath does not purport treason, there is an end of the present indictment.

The public prosecutor immediately adds, "Which oath or obligation did thus purport or intend to bind the persons taking the same to commit treason, by effecting by physical force the subversion of the established government, laws, and constitution of this kingdom." No doubt the prosecutor makes that averment. But I say the averment is utterly unfounded, and that the oath does not purport the obligation which he says it purports. It is for your Lordships to judge whether it does so or not; and if you are of opinion that it does not, then nothing that the prosecutor affirms on the subject can have the smallest influence, as he is not entitled to go to the Jury, and leave it to them to determine what is the purport of the oath; for that would be to take the relevancy of the indictment out of your hands into his own.

The prosecutor has given you a gloss or comment on the oath, and you will judge if it be correct. The civilians have a nickname, I forget what it is, for a gloss which extracts a meaning from the text exactly the reverse of what it naturally bears. This gloss is precisely of that nature.

In the oath there are the words, "I will support the same to the utmost of my power, either by moral or physical *strength*." In the prosecutor's comment the word *force* is substituted

for *strength*. That may be thought immaterial, and to have proceeded from inattention, but it is not so. It has been introduced in order to insinuate something different from what the oath purports. Strength in common language applies to bodily exertion. Force applies to an assemblage of armed persons. Although you can speak of an armed force, you cannot speak of an armed strength; a circumstance which shows, that the meaning of the words is not the same. The prosecutor by this clause means to insinuate, that the parties were to endeavour by an armed force to obtain their objects; a purpose which cannot be inferred from the words of the oath at all. It is farther said, that the oath was to bind to the "subversion of the established government, laws, and constitution of this kingdom," but there is nothing from the beginning to the end of the oath about *effecting* any thing. The parties bound themselves to use endeavours to obtain annual parliaments and universal suffrage; and these, if obtained in a lawful manner, are not a subversion of the government, laws, and constitution of the kingdom. The gloss, therefore, has extracted a meaning from the text exactly the reverse of what the words bear. The public prosecutor cannot be allowed to do this; and the libel on that account is irrelevant.

But I go farther, and I request you to observe what may not at first sight be apparent, but which, on full consideration of the law, will immediately occur to all of you, that even on the supposition that this oath did purport what the public prosecutor says it does, yet it would not purport an obligation to commit treason. For I maintain, that persons bound to effect by physical force the subversion of the established government, laws, and constitution of the kingdom, are not necessarily bound to commit treason. It is well known to your Lordships that there are two great species of treason in law. We shall dismiss from our consideration at present a great many treasons, such as debasing the coin, murdering judges, &c. with which the public prosecutor does not and cannot pretend that this oath could have any connexion whatever. There are just two kinds of treason specified in the statute of Edward III. to which it could possibly refer; 1st, compassing the King's death; 2d, levying war against him. I shall afterwards speak of a third treason, established by a subsequent act, the 36th of the King.

In order to make an indictment for either of these two kinds of treason relevant, it is not enough to say, that the party intended to effect, or has effected by force, the subversion of the government, for that is not necessarily compassing

the death of the King, or levying war against him. Though some of the acts performed in subverting the government might be overt acts of treason, they are not necessarily so. In order to establish the first kind of treason, two things are necessary. You must have a wicked imagination in the mind, namely, the compassing of the King's death; and you must have overt acts, which the law considers as proof sufficient to establish that imagination. But it is not laid here that the oath bound those who took it to compass or imagine the death of the King. I cannot illustrate my argument as it applies to the case before you, better than by appealing to an extreme case, with which you are all well acquainted—the trials of the regicides in the 17th century. You will recollect how the indictments were there laid "for compassing and imagining the death of the King;" and the overt act of that treason was cutting off the head of the King. It would not have been relevant to have merely charged the act of putting the King to death, as the crime of treason—the crime consisted in the imagination of the heart; the death of the King was the evidence that that imagination existed. In the same manner, the subversion of the laws and constitution of the kingdom is not treason, though it is probable in effecting that subversion overt acts may be committed, which afford evidence of treason.

The other species of treason which I mentioned, was levying war against the King. To constitute that crime, the use of physical force in the subversion of the laws or constitution of the kingdom, is not sufficient. One of two things is necessary; either, on the one hand, the persons using that force must be assembled in the guise of war, as it is expressed in the Norman jargon of the law, *arriati modo guerrino;* they must proceed *sub specie belli*, armed with warlike engines, with colours displayed, and to the sound of trumpets and drums: or, on the other hand, there must be so great a multitude assembled, that their numbers may compensate for the want of the pride, pomp, and circumstance of war. Certain persons met together, and prosecuting an illegal object by force, does not necessarily constitute a levying of war against the King,—unless it have the characteristics I have mentioned, it is not treason. I am unwilling to detain you in a case of this kind by quoting authorities on the subject. I could quote a great many, but I shall content myself with referring you to Hale and Foster, in their chapters on this subject.

There is a third treason, that of conspiring to levy war in order to accomplish certain objects, as to put the King

under restraint, to intimidate Parliament, or force the Parliament to enact certain laws. This treason was introduced by the 36th of the King, ch. 2.

I ask, then, whether this oath, granting that it purports what the prosecutor affirms it purports, imposes an obligation to commit any one of these three distinct species of treason? I have already stated the reasons, from which your Lordships must be convinced that it does not bind the taker to compass or imagine the death of the King. Just as little does it bind him to levy war against the King, or to conspire to levy war against him.

I have said that force may be used, nay, successfully used, to subvert the constitution, and yet no war be levied against the King. I shall give an instance of this, which appears to me decisive on the merits of the present question. Suppose that the House of Lords (which of course they never will do) should pass a bill to abolish the House of Commons, or their own House, as a branch of the Legislature, and if such bill passed into a law, it would effect the complete subversion of the constitution. Suppose, in the next place, that this bill, when carried to the House of Commons, should divide the House equally, and of consequence its fate should depend on the casting vote of the Speaker. In those circumstances, if twenty or thirty individuals, not armed *modo guerrino*, but with sticks in their hands, should go down and compel the Speaker by threats or violence to vote for this bill,—the bill having afterwards received the royal assent, would operate as the subversion of the constitution, and it would be a subversion accomplished by force; yet no lawyer will maintain, that this is a case of high treason, that it is a case of compassing the King's death, or of levying war against him, or of conspiring to levy war.

I repeat, then, that although this oath did purport what the public prosecutor says it does, but which most certainly it does not, still it would not support the charge in the major proposition. If the prisoner was accused of having subverted the constitution by force, could that charge go to trial as a charge of high treason? assuredly it could not; and for the same reason a charge of having administered an oath purporting to bind the taker to subvert the constitution by force, is not a charge of having administered an oath binding him to commit treason.

I have now considered the oath as "*purporting*" to bind. That word, as I have endeavoured to explain it, and I trust I have soundly explained it, implies nothing more

than the meaning of the oath as it may be gathered from the words set forth. But then the public prosecutor says that this oath purported, *or intended*; and the question comes to be, Does the use of the word *intend* make any difference? I apprehend it does not; for the *intendment* of a writing or speech in the ordinary case is just the same thing as its *purport*. You will observe the Act of Parliament does not say, if the person administering the oath intends to bind to the commission of treason, that his intention shall infer the crime. This is not the meaning of the statute; for it requires, that there shall be *an oath or engagement* "intending" *to bind*, &c. It is the intendment of the oath, not of the person, which the statute mentions; and, therefore, though it were perfectly clear that the prisoner administered this oath, and that it was his intention to bind the party taking it to commit treason, yet that is not enough, if the oath itself do not bind to that effect. Now, that cannot be inferred from the words of the oath; for if you interpret them fairly, they mean nothing but what is, or at least may be, perfectly innocent.

But then, perhaps, we shall be told that the public prosecutor will prove, by facts and circumstances, that the intendment of the oath is different from the purport; and it occurred to me that he has some such idea, from the circumstance that he has drawn the narrative of his minor proposition in the way which he has done. I have various objections to this view of the subject, to which I must call your particular attention.

In the first place you will observe, that in the libel itself the prosecutor gives up the charge of *intending*, and relies on that of *purporting* altogether; for in the close of the libel (where, though the same detail is not necessary, yet the crime must be set forth with the same critical accuracy) he says, "At least, times and places foresaid, the said oath or engagement, or an oath or engagement to the same *purport*, was wickedly, maliciously, and traitorously administered, or caused to be administered," &c. He does not say it was an oath to the same *intent*; and therefore, unless he establishes that an oath of this purport was administered, he does nothing at all. But this is not the objection on which I chiefly rely.

It is an established principle in the law of Scotland, that the minor proposition shall be laid specifically, and that every material circumstance shall there be stated which is to be made the subject of proof against the prisoner. The prosecutor is not at liberty to make out the intendment of this

oath from facts and circumstances to which he only alludes in a vague manner; the libel is defective, unless these facts and circumstances are distinctly specified. Would it do in an indictment under this statute to say, that the prisoner, at the times and places mentioned, administered the oath of allegiance, but under cover of that oath he intended to bind the party to commit certain crimes? No. It would be necessary for the prosecutor to set forth what were the facts and circumstances which established the criminal quality. In a trial for a calumnious or seditious libel, would it be enough to specify that the prisoner repeated the first stanza of Chevy Chace, without specifying how it happened that words having a natural, obvious, and innocent meaning, were in reality directed to a totally different and a criminal object? The prosecutor must set forth the facts and circumstances from which he makes his inference, otherwise the indictment is not laid with that minuteness which the law requires. But your Lordships will observe, that no fact is here specified from which such an inference can be deduced. It is stated in the narrative, that the prisoner "having wickedly, maliciously, and traitorously conspired and agreed with other evil disposed persons to break and disturb the public peace, to change, subvert, and overthrow the government, and to excite, move, and raise insurrection and rebellion, and especially to hold and attend secret meetings, for the purpose of obtaining annual Parliaments and universal suffrage, did then and there wickedly, maliciously, and traitorously administer, or cause to be administered, or did aid and assist in the administering, to a great number of persons, an oath or engagement, or an obligation in the form of an oath," &c. In the first place I say, that supposing the prisoner committed all these crimes, it is no necessary inference from that hypothesis that he intended to administer an unlawful oath. They do not create the smallest presumption to that effect; for a man may be engaged in treason himself, and yet have no intention to impose an oath binding his associate to commit treason.

But there is another view of the case. Supposing it competent from facts and circumstances to prove that an oath which does not purport any obligation of the nature libelled, was nevertheless intended by the parties to impose that obligation, yet the facts and circumstances here resorted to are of a kind which precludes the prosecutor from making use of them for that purpose. If the narrative of this indictment were to be proved, it would infer that the prisoner had committed treason; but will your Lordships permit the Lord Advo-

cate to prove that a man has been guilty of treason in order to convict him of a felony. I submit that this is manifestly incompetent. It is a general rule in criminal law, and is so laid down by Mr Burnet in his work upon that subject. (p. 611.) His 18th canon upon evidence is in these words: "One crime cannot be proved by evidence as to another. If A be charged with three acts of theft, a proof of two of them cannot be offered in evidence of his guilt as to the third." Your Lordships will see at once the principle upon which this rule is founded, and indeed it is afterwards stated by the learned author whom I have just quoted. He says, "it is to avoid the risk of a jury being influenced by the proof of one crime in judging of the proof of another." It would be most dangerous to the subjects of this country were it held, that because a man had perpetrated one crime of which he was not accused, the jury might conclude that he had perpetrated another of which he was accused. This may perhaps be a moral, but it is no legal ground of inference. If I know that my servant has stolen an article from me on one day, and if another is missed the day following, I may very naturally conclude, that he who stole the first stole the second also. But if the servant was tried for the second theft alone, your Lordships assuredly would not allow the prosecutor to go into evidence of the first theft. It could answer no purpose, but the improper purpose of creating a prejudice in the mind of the jury. It is therefore a salutary and expedient rule, and a rule which I trust will always be received, that one crime cannot be proved in order to establish another. As the prisoner therefore is charged with having administered an unlawful oath, and as for that crime and for no other a conviction is demanded, the prosecutor cannot be allowed to prove in support of that charge that he committed another crime, namely that of treason. Nothing could be more unfair or more contrary to the principles of criminal law.

Inaccurate opinions have sometimes been received on this subject. I have used the argument myself, that every thing is evidence which tends to produce belief in the minds of the jury. That is not the law of Scotland or of any civilized country. The law judges what should be allowed to produce belief in the jury, and for the reasons which have just been assigned, it will not allow evidence of one crime to be used as evidence of another. Though the prisoner was convicted of being a traitor, the highest crime which can be committed in any state, that circumstance could not be permitted to have the smallest influence in convicting him of

a lesser offence, not supported by evidence applicable to itself.

There is another reason why the narrative of the minor proposition cannot be competently sent to proof. It is there stated, that the prisoner was engaged in a treasonable conspiracy, but it is not stated with whom he was engaged in that conspiracy. Nay, it is not stated that the other conspirators were persons to the prosecutor unknown. Even upon the supposition, therefore, that this charge had been laid in the major, which it is not, it could not be sent to proof, because the prosecutor has not given that information with regard to it, which according to the forms of the law of Scotland he was bound to give, that the prisoner might be enabled to prepare his defence. Where a conspiracy is charged against an individual, the other persons conspiring must be specified, or at least it must be stated, that those persons are unknown to the prosecutor, if even that is sufficient.

If that remark is applicable to the charge of conspiracy, how much more so is it to that of treason? To convict a person of treason, many requisites must occur which are not found here. No man can be put upon trial for that crime unless a bill is found against him by a Grand Jury; and after the bill is found, many forms must be observed unknown to the criminal law of Scotland in other cases. For example, the prisoner is entitled to challenge a certain number of his jury peremptorily, and without cause shewn. He has various other privileges unnecessary to be stated. But none of these privileges have been allowed to the prisoner here, because he is put upon his trial for a felony. It is impossible that your Lordships will allow him to be tried for treason by our forms of procedure, when it is enacted by special statute, that treason can only be tried by the forms of the law of England.

It is no answer to this argument for the prosecutor to say, we are going to try the prisoner for treason, but we are not to punish him for treason. We ask for no other punishment but that which is applicable to the crime laid in the major proposition of the indictment. If the jury find the prisoner guilty of treason, though he escape the punishment, his character is blasted, he is a convicted traitor, and he suffers an injury which the prosecutor is not entitled to inflict. On the other hand, suppose him to be acquitted under this indictment, the acquittal is of no benefit to him, for not only might his character be ruined, but he may be again brought to trial for treason in a regular way.

LORD ADVOCATE.—He cannot be again brought to trial.

MR CRANSTOUN.—The Lord Advocate thinks differently from me, but he is wrong. If the prisoner be acquitted of administering the unlawful oath, that act cannot be laid as an overt act of treason in an indictment for that crime. But here treasonable practices are stated for the purpose of proving, that the oath administered imposed an obligation to commit treason. Now the Lord Advocate cannot be prevented from trying the prisoner for these practices as treason, although the prisoner should be acquitted of the present charge. The words of the act are, "Provided also, and it is hereby declared, that any person who shall be tried, and acquitted or convicted of any offence against this Act, shall not be liable to be indicted, prosecuted, or tried again for the same offence or fact as high treason or misprision of high treason."

From these words it appears, that after a trial on this indictment the prisoner cannot be tried for treason on the ground of having administered this oath, but he may notwithstanding be tried for treason on account of any one of the acts which his Lordship narrates in the minor proposition, as evidence that the prisoner and his associates were engaged in treasonable practices.

This being the case, what would be the result of a trial under this indictment, supposing that the prisoner is acquitted? It would be just a precognition, and what is more, a public precognition, taken for the purpose of convicting him afterwards of high treason. And as he might be tried twenty times for administering unlawful oaths, all these trials might be with no other view than that of trying him for high treason at last. I put it to your Lordships, if oppression of this kind could be endured in this country, —if there would not be an end of all liberty and all security?

I lay it down therefore as clear law, that one crime cannot be used as proof of another. There is nothing set forth in this libel in order to prove the *intent* of the oath as contradistinguished from its *purport*, except facts which infer other crimes, and which, on that account, cannot be admitted to proof. The whole narrative of the minor proposition must be blotted out as incompetent, and that being done there is nothing left but the words of the oath, and these words do not purport any obligation to commit treason. The prosecutor may aver the contrary—he may say, that whatever may be the apparent purport, the real intend-

ment was an unlawful obligation: but if he makes this averment, something farther is necessary; he must state specifically the facts and circumstances by which he is to prove, that words, innocent in themselves, were used with a guilty intent; and these facts and circumstances must be relevant to ground that inference, and competent in themselves to be proved. Farther, as already said, it is not the intention of the parties, but the intendment of the words which must be criminal.

But if the narrative of the minor proposition be struck out, and I have shewn that it must be so, then there is no specification of facts whatever to establish an intendment different from the purport of the oath. What specification is necessary in the minor proposition of a criminal indictment according to the law of Scotland? All our authorities say that the minor proposition must set forth a full and accurate detail of all the circumstances material to the case. But if the Lord Advocate attempts to extract and elicit from innocent words a different meaning from that which they obviously bear, and does not specify the circumstances from which he infers that hidden meaning, then the minor proposition is imperfect for want of specification, and the libel is irrelevant.

I had formerly occasion to refer your Lordships to the practice in trials for perjury: and it appears to me that there is a great affinity between trials for that crime, and the present. Perjury consists in taking an oath which purports falsehood: the present crime consists in administering one which purports an unlawful obligation. In both there is the use of an ordinary solemnity, with the criminal intention in the one case to deceive, and in the other case to bind to the commission of a crime. The crimes are analogous. In a case like the present, which is new, it is most desirable to refer to analogous cases, in order to gather what are the rules of proceeding. Let us consider then what is your proceeding when you try a person on a libel for perjury. Mr Hume, in stating what are the specifications necessary in a libel for perjury, observes, that "it is more especially requisite, that in all process for perjury the prosecutor be not allowed to lay his libel generally, or in ambiguous terms; since otherwise he would take the cognizance of the relevancy of the charge to himself, out of the hands of the Court, to whom of right it belongs. He has to explain, therefore, wherein it is that the falsehood lies, and must support (or as we say, *qualify*) his charge with such a statement of the circumstances of the

fact, as justifies his averment of a false oath having been taken, and shall ground a clear inference (if they be proved) concerning the situation of the pannel's conscience on the occasion." It thus appears, that in a charge of perjury, in order to make the libel relevant, it is not enough to assert that the prisoner has sworn a false oath. The prosecutor must point out in detail the circumstances on which he rests his averment, that what was sworn is false. If that be the case in a trial for perjury,—in the analogous crime now in question,—if the prosecutor libels words in themselves innocent, he must specify facts relevant and competent to be proved, in order to make out the proposition that these words were used with a guilty intendment—an intendment understood by both parties. Therefore unless you require a specification of facts, which I apprehend is essentially necessary to extract a guilty intendment from the words of this oath, in themselves innocent, you depart from one of the best established rules of the law of Scotland. What is said by Mr Hume as to trials for perjury, is equally applicable to a trial under this act.

I have already taken occasion to observe, that one of the most valuable statutes in our code is the statute of 1st Mary, cap. 1. It is in our code, for it is a law regarding treason, and of consequence introduced along with all the other laws of England upon that subject by the 7th Anne, cap. 21. I pray your Lordships to attend to the preamble of that statute of the 1st Mary: "That the estate of every king consists more assuredly in the love of the subjects towards their prince, than in the dread of laws made with rigorous pains; and that laws made for the preservation of the commonwealth without great penalties, are more often obeyed and kept than laws made with extreme punishments. And in special such laws so made, whereby not the ignorant, but also the learned, minding honesty, are often trapped, yea, many times for words only, without fact or deed done or perpetrated; and thereupon the queen calls to remembrance, that many, as well honourable persons as others of good reputation, had then of late (for words only, without either opinion, fact, or deed,) suffered death, and expresses her pleasure, that the severity of such like extreme dangerous and painful laws shall be abolished." This preamble explains the extreme danger and mischief arising from laws inflicting the pains of treason on offences which are not accurately defined, and more particularly for words spoken; and accordingly the whole body of constructive treasons were swept away by that act.

Now, the statute upon which the present indictment is founded introduced a constructive felony, on which it inflicts the same punishment as that which is inflicted in treason, at least in all material respects the same. I did not read the preamble of the act of Queen Mary, to throw blame on the statute now under consideration, but to shew the difficulty and danger attending the application of every law of this description, as the Legislature itself has clearly expressed in that preamble. But the statute having been enacted, what is the proper corrective for the evils to which I allude? I do not know what is the practice on the other side the Tweed, for I do not know the details of criminal procedure there, but I know that in Scotland the corrective is to be found in our forms of criminal procedure; and whatever defects there may be in the law of Scotland, there are some excellencies, and one of them is that minuteness of specification which the public prosecutor is bound to observe in his indictment. The proper precaution for preventing this statute from being made a source of oppression and injustice, is to observe our forms of criminal procedure; and I maintain one of our best forms will be neglected, if you allow a proof of the minor proposition here to go to a jury, when there is no specification in the libel to shew that the words of the oath were used in a sense different from their ordinary sense. Their ordinary sense, as I have endeavoured to prove, or rather as I think must be manifest at first sight, is perfectly innocent; at least it is not an obligation to commit treason. If this libel be allowed to go to trial under other Judges, the administration of any oath, of the oath of allegiance itself, might be made the ground of a prosecution under this statute. The author whom I have already had occasion to quote, says, that the rule of the minor proposition, containing a specification of all the facts on which the charge rests, was attended to anxiously, even in the worst times. We know well what are the times to which he alludes, indeed they are pointed out by the decisions to which he refers; namely, the period between 1679 and 1688, when your books of adjournal are stained with the most atrocious murders perpetrated under the colour of law—by Judges the most unprincipled that ever sat upon that bench. If in that period, and under these Judges, the rule in question was not departed from even in the trial of state crimes, it will not be departed from in these liberal and enlightened days, and while your Lordships preside in this Court. On these grounds, I relate to your Lordships with confidence what is the genuine conviction of my own mind, that this

is not a relevant indictment, and that if it be sent to a Jury, a precedent will be established fraught with the greatest danger.

[Mr Cranstoun made an apology for occupying the Court so long.]

Lord Justice Clerk.—I express the opinion of the Court, that there is no reason for such an apology. We have all heard the very able, eloquent, and argumentative pleading for the pannel, with the most perfect satisfaction.

Mr Drummond.—A very difficult task has devolved itself upon me, that of answering one of the ablest arguments which I ever had occasion to hear; and I have this impression so strongly on my mind, that unless I had some confidence in the merits of the cause which I am to support, I should feel the greatest diffidence in attempting to answer the speech of the learned gentleman. I trust, however, that the case will speak pretty strongly for itself; and my learned friend who is to follow me will, much more ably than I can do, supply what I may happen to omit.

The charge against the pannel at the Bar is for a statutory offence. He is charged with administering an oath of a particular description. The rules of law are clear with regard to the manner of describing a criminal act. The words of Mr Hume are, "That a libel is not good, unless it give such an account of the criminal deed as may distinguish this particular charge from all other instances of the same sort of crime, and thus bring the pannel to the Bar sufficiently informed of that whereof he is accused."—(Vol. iii. p. 310.)

If this description of the duty of the prosecutor be correct, I apprehend this indictment must clearly go to trial; for it sets forth the crime charged in a manner to distinguish it from every other instance of the same sort of crime. The criminal deed is the administering of the oath, and the oath itself is set forth in the indictment. Even if it had not been in the power of the prosecutor to obtain the terms of the oath, yet, by this statute, it was competent to him to charge its purport. But the prosecutor has fortunately had more in his power, for he has obtained the oath itself, and he has recited it at length in the indictment.

Mr Hume proceeds afterwards to describe the manner in which the criminal deed should be set forth; and as the learned gentleman who went before me dwelt some time on

this subject, I shall be under the necessity of quoting at length Mr Hume's views of the duty of the prosecutor. (Mr Drummond here read from Vol. iii. p. 325. and subsequent passages, and maintained that the description of the offence in this indictment was sufficiently specific).

I apprehend that the prosecutor is correct as to the times and places, and the individuals to whom the oath was administered, as no objection has been stated to the indictment with regard to these points. And, considering the particular character of this crime charged, and that it is of a secret nature, and extremely difficult to detect, I think your Lordships must be satisfied, that the prosecutor has given as full and particular a description of it as the pannel could expect.

This is a crime, in many respects, of a very particular character. It is necessary, indeed, as was correctly stated by the learned gentleman, that the oath itself should bind to the commission of treason, or of some capital felony. It is not sufficient that the party administering the oath, or the party taking it, should have treasonable, or other criminal intentions; but it is necessary that the oath itself should bind to the commission of treason, or some other crime. This was most correctly laid down by the learned gentleman, and any inference which the prosecutor may think himself entitled to draw from the oath will not be sufficient, if it do not clearly appear that the oath itself is of the precise purport necessary to inculpate the pannel on the statute founded upon in the indictment. On this part of the case I am ready to meet the learned gentleman; for it appears to me very clearly that this oath does contain an obligation to commit treason, and that, upon a fair construction of it, no man of good sense can fail to be of this opinion. The oath says, "I will persevere in my endeavours to obtain for all the people in Great Britain and Ireland, not disqualified by crimes or insanity, the elective franchise, at the age of twenty-one, with free and equal representation and annual Parliaments; and that I will support the same to the utmost of my power either by moral or physical strength, as the case may require." The learned gentleman stated, that the oath binds the person taking it to support the endeavours made to obtain annual Parliaments and universal suffrage, and he stated so correctly. He observed that the oath could not bind them to support what was not in existence, and that therefore it was to obtain, not to support, annual Parliaments and universal suffrage, things not in existence, that the oath had been adminis-

tered and taken. It remains for you to consider, whether the oath to support with moral and physical strength endeavours made to obtain annual Parliaments and universal suffrage, is an oath which subjects those administering or taking it to the charge of administering or taking an oath purporting to bind those taking the same to commit treason? and upon that narrowed construction of the oath I join issue with the opposite Counsel.

It was said very ingeniously, that physical strength may be innocently employed in many ways for the support of endeavours to obtain universal suffrage and annual Parliaments—that it may be employed in the erecting of hustings for meetings to petition Parliament on the subject—that it may be employed in running about and soliciting Members of the Legislature to give their support to such petitions. These are certainly exercises of physical strength, but not of the kind referred to in the oath. The oath binds the persons taking it to use *all* their physical strength, as the case may require. The instances which have been mentioned of the application of physical strength are not the only ways in which physical strength may be employed, in order to obtain the objects spoken of; yet, by the terms of the oath, there is no limitation as to the kind of physical strength which the parties were to use. They were to use the whole of their moral and physical strength; and the terms force and strength have here the same meaning. If an innocent purpose only had been in the view of these persons, then why were they anxious for concealment?—What follows in the oath? "And I do further swear, that neither hopes, fears, rewards, or punishments, shall induce me to inform on, or give evidence against, any member or members, collectively or individually, for any act or expression done or made, in or out, in this or similar societies, under the punishment of death, to be inflicted on me by any member or members of such societies. So help me God, and keep me stedfast." This is a remarkable part of the oath, and surely such concealment was not necessary in erecting hustings, or doing any of the things which were suggested by the learned Counsel in his illustrations. There can be no use for such concealment, where lawful means are to be employed for the attainment of lawful objects. Every person who reads the oath must see that it proves in the strongest manner, that illegal objects were in the view of the parties. This is obvious, without travelling beyond the four corners of the oath itself. It is so obvious, that no argument can prevent the indictment from going to trial.

The oath alone, without going to any other article of evidence, is directly criminal, and implies that the purpose for which the meeting was assembled was an illegal purpose, and the association an illegal association.

It was said by the learned gentleman, that the word "force" had been "*artfully*" substituted in the indictment for the word "strength." But according to my construction, they have no different meaning—they are synonymous. But I may answer his statement by a remark of his own which is well founded, that any inference from the oath adjected in the indictment does not signify, unless the oath itself necessarily imply that inference. The artifice, therefore, if there had been any, (and there was assuredly none), could have no effect, as your Lordships are to judge of the oath itself, and not of the conclusions drawn from it by the prosecutor.

It is also libelled in the indictment, (and to the proof of that there has been no objection stated), that this oath was administered at secret meetings. To a proof of this averment, no objection has or can be made; and if it shall be proved that this oath was administered at a secret meeting, this is an additional circumstance of evidence which must go to the assize, to shew that the purpose of the oath was illegal and criminal. That the oath was administered at a secret meeting is charged, I observe, with regard to the meeting first libelled on in the indictment.

It is argued, that the narrative of the indictment—the general statement of treasonable conduct which precedes the statement of the particulars founded on—is not relevant to be proved. I apprehend, however, that many examples might be given from the daily practice of the Court of such narratives as this going to a Jury. One example that occurs to me,—(I am sorry that I am under the necessity of speaking from memory alone, as I am certain that if I had had time to make an investigation, I could have produced many examples on the point),—an example, I say, occurs to me, which is probably in your recollection. The case I allude to was that of a charge for uttering forged notes. The forgery had been committed in England;—that crime, therefore, the Court had no jurisdiction to try. Yet you admitted the statement of the forgery in the narrative of the indictment *in modum probationis* of the crime of uttering the forged notes in Scotland, and as relevant to infer the knowledge of the forgery in the utterer. This is settled law; and the oath here charged is at least as intimately connected with the statement of treasonable practices mentioned in the

narrative, as the crime of uttering forged notes was with the perpetration of the forgery. I am not going too far in saying that the oath is nothing else than an overt act of a general treasonable conspiracy, not now charged against the parties. The whole import and construction of the present charge, indeed, involves the existence of another crime. The administration of the oath is a criminal act, binding the takers to commit another crime; and how is it possible to separate the two? How can any circumstances regarding the one be explained without mentioning the other? We are bound to shew that there was treason, which would have been speedily matured, if the purposes of the persons who administered and who took the oath had been carried into effect. We are to prove what they were hatching,—what they intended,—and it is impossible to lay out of view the preparations they were making for committing treason, in speaking of what they bound themselves to accomplish. Thus the rule of not admitting proof of one crime in evidence of another, must be received with some qualification, and it has always been so in practice. (Mr Drummond here referred to Mr Hume, Vol. III. p. 411, and to the case of Thomas Somerville, who was tried for perjury in 1813, as mentioned in the corresponding part of the Supplement, p. 226.) There you have evidence of one crime admitted to prove another, although the one was quite different from the other. But here the crimes are intimately and almost inseparably connected. It is an established rule in the English law books, in cases of treason, not only that one overt act not laid as a charge, may be adduced as proof of one that is laid, but that a general proof of rebellion or conspiracy is allowed before proceeding to the particular acts charged; and the case of Strafford, a well known case, was quoted some years ago, and received as an authority on this point in the trials of Watt and Downie,—in which the existence of a treasonable plot was allowed to be proved before the overt acts charged. The principal question is, Whether the matter offered in evidence be pertinent to the point in issue?

It was said that we are not entitled to try a man for treason in this form, and that therefore we cannot indirectly try the treason as proof of another crime. I appeal, in answer to this, to the Act of Parliament under which we are now proceeding. The whole Act, and particularly the last clause, proceeds on the understanding that we are entitled to go on as we are doing in this trial, although the crime tried be treason.

"Provided also, and it is hereby declared, that any person who shall be tried and acquitted, or convicted of any offence against this Act, shall not be liable to be indicted, prosecuted, or tried again for the same offence or fact, as high treason, or misprision of high treason; and that nothing in this Act contained shall be construed to extend to prohibit any person guilty of any offence against this Act, and who shall not be tried for the same as an offence against this Act, from being tried for the same as high treason, or misprision of high treason, in such manner as if this Act had not been made."

Even if this Act had never existed, I should have been prepared to maintain, on the ordinary rules of law, the competency of trying what might have been tried as treason, under a lower denomination of crime; but the clause now quoted is quite conclusive. There is, therefore, nothing in the circumstance that the criminal proceedings set forth in the narrative of the indictment happen to be of a treasonable nature, that can make any difference in the case; and I submit, that as they form part of the *res gesta* at the time of administering the oath, and naturally enter into the history of the transaction, they ought to be admitted to proof, and found relevant with the rest of the libel. They are intimately and inseparably connected with the proof of the crime charged, and afford the clearest and most relevant *indicia* that can be imagined of the guilty purpose of the pannel. It seems unnecessary to add, that if it be relevant to introduce this statement *narrative*, the same specification is not requisite as if it had been made the subject of a substantive charge; and I should not have made this remark at all, unless there had appeared a disposition to argue upon this narrative, as if the relevancy of it were to be tried by the same rules as a charge in the indictment.

It was said by the learned gentleman, that the particulars charged as what the parties bound themselves to commit, would not have amounted to high treason, even if they had been carried into effect. But how it can be maintained that the employment of force to accomplish public measures of this description, is not treason, I cannot conceive. It appears to me to be beyond the ingenuity of even the learned gentleman himself, to persuade any person, that a public measure of any sort may be accomplished, not to say the fundamental principles of the constitution subverted by force, by a number of persons conspiring together for that purpose, without levying war against the King. According to my view of the law, I might have been entitled to charge the

administration of the oath itself as high treason. The words of the statute of the 36th of the King, c. 7. seem completely in point, as to the treasonable nature of the association and the oath. "If any person or persons, &c. shall compass, imagine, invent, devise, or intend death or destruction, &c. &c. or to deprive or depose him, &c. or to levy war against his Majesty, in order, by force or constraint, to compel him to change his measures or counsels, or in order to put any force or constraint upon, or to intimidate or overcome both Houses, or either House of Parliament——and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by any overt act or deed." Even under the first head of the statute of Edward III. it might have been maintained to be treason to conspire for the accomplishment of universal suffrage and annual Parliaments by force; and the oath and secret meeting might have been offered in evidence as overt acts.

But it is unnecessary to enter upon the question, whether the acts libelled as having been done, might have justified a charge of treason. It is enough for the present purpose to say, that if the force which the parties bound themselves by this oath to use, for obtaining annual parliaments and universal suffrage, had been actually employed for those purposes, which are not only of a public nature, but utterly subversive of the whole frame of the constitution, this would clearly have been that species of treason which consists in levying war against the King.

It was said, that the concluding part of the indictment does not correspond with what goes before, as the charge of *intending* is omitted, and that of *purporting* only relied upon. It is true, that the prosecutor relies completely on the charge of *purporting*, because the purport and open meaning of the oath is so clear; but the proper answer to this critical objection is, that it is quite unnecessary and unusual to repeat in this part of an indictment the whole expressions previously used, as it always bears such a reference to what goes before, as to point the attention to the preceding description as that which is here spoken of. Thus, "Times and places *foresaid*, the *said* oath or engagement," &c. This is the usual style, and it is not customary to repeat all the preceding epithets and qualifications, which are included and held repeated by the reference to what goes before.

I am sensible that there are many things which I have omitted, but I will not detain your Lordships longer.

Mr Solicitor General.—In concluding the debate on the part of the Crown, I must be pardoned for observing in behalf of the prosecutor, that nothing is or can be more remote from his intention, than to introduce into the law of the land any of those constructive treasons to which reference was made by my learned friend at the commencement of his speech for the pannel. Nothing can be more remote from the intention of the public prosecutor in Scotland at any period. And if such a profligate design existed, it would meet with a sure and signal defeat from the independence of the Bar, and from the vigour and integrity of the Court.

The present prosecution does not involve any charge of constructive treason. It is founded upon a statute of recent introduction; a statute quite plain and explicit; a statute, which, very unfortunately for the country, the late corruption of the public mind and of the moral habits of some part of the population has rendered necessary for the protection of the state.

In answering the argument maintained for the pannel, I must take leave to recal to your Lordships' notice two of the species of treason, which were not introduced, but well defined, by the statute of Edward III. These two species of treason are,—*first*, Compassing the death of the King; *secondly*, Levying war against the King.

Your Lordships are all aware, that by declaring and defining the first species of treason, the Legislature bestowed upon a mental act—upon the imagining or compassing in the mind of the death of the King,—the character of a completed crime, punishable by a high sanction; and it provided, that in the case of this highest offence against the state, mere intention, (which in other cases is not cognizable by the criminal tribunals to that effect), should hold the same rank in the scale of guilt and of punishment with a completed act. It rendered the compassing or imagining, the mere conception or design of destroying the King, punishable with the pains of treason. There is a remarkable distinction, therefore, between this class of crimes and all others. It may be said generally, almost without exception, that the mere compassing of any other act, the mere compassing of murder, for instance, the criminally imagining of such a deed is not a cognizable crime, at least is not cognizable as the crime of murder. But in this department of the law the case is different. The imagination of the King's death is the statutory crime, and nothing more is

I may here state, that in construing the oath there can be little room for difference of opinion as to the principle on which you ought to proceed. I am willing to admit, that the pannel at the Bar is not to be ensnared by any subtle, recondite, and remote interpretation of the oath, by any interpretation different from that which an ordinary man would put upon it, on reading it from beginning to end. But I maintain with equal confidence, that the pannel cannot escape from the law, and the public safety is not to be endangered, by a construction in his favour, which is recondite or subtle—by an interpretation of the oath, which it plainly could not bear in his own mind, and which plainly he knew it did not bear in the mind of those to whom it was administered. Between these two extremes, it is your peculiar province to strike out the middle course, and to adopt that just and rational interpretation which will not only command the acquiescence, but the approbation of the public prosecutor.

What does the oath say? "In the awful presence of God, I, A B, do voluntarily swear, that I will persevere in my endeavouring to form a brotherhood of affection amongst Britons of every description, who are considered worthy of confidence." I concur with my learned friend in saying, that this part of the oath, if taken by itself, is perfectly innocent. The oath goes on, "And that I will persevere in my endeavours to obtain for all the people in Great Britain and Ireland, not disqualified by crimes or insanity, the elective franchise, at the age of twenty-one, with free and equal representation, and annual Parliaments; and that I will support the same to the utmost of my power, either by moral or physical strength, as the case may require: And I do further swear, that neither hopes, fears, rewards, or punishments, shall induce me to inform on, or give evidence against, any member or members, collectively or individually, for any act or expression done or made, in or out, in this or similar societies, under the punishment of death, to be inflicted on me by any member or members of such societies. So help me God, and keep me stedfast." Two questions have been stirred on this part of the oath. The Counsel for the pannel has maintained two propositions. *First*, That the words "*support the same*" mean, that the oath-taker was to support annual Parliaments and universal suffrage, after these mighty improvements were established by regular and constitutional means. And, *second*, That even if the words *support the same* mean, to support the endeavours to obtain these objects, yet the *physical*

strength to be used was capable of being used in a manner not illegal.

On the first point, your Lordships have to consider what is here understood by the word *same*. What is the antecedent to this pronoun? I submit, there are only two ways of giving a sound construction of this word. It must either apply to the whole of the previous branch of the sentence, or to a part of it. If the first is adopted, and if it be held to embrace the whole of the previous part of the sentence, and if the antecedent be considered as thus extensive, then the construction put upon it on the other side will be destroyed; for if the word "same" embraces all the previous part of the sentence, it includes both the use of physical force in obtaining annual Parliaments and universal suffrage, and its employment in maintaining these objects after they are accomplished. This is a mode of construction so perfectly fair, that the pannels cannot object to it.

But this is not the construction which a perusal of the oath naturally dictates. It is clear that by it the obligation to accomplish the wished-for changes by physical strength was contemplated, and that this was the sole purpose of the oath. I maintain, that taking the whole of the oath together comprehending the obligation to concealment, it is impossible to consider it without concluding, not by a remote and distant construction, but by direct, rational, necessary inference, that the parties had in their minds a criminal accomplishment of their designs, and the moment criminal intention is granted to me, it follows that there can be no criminal accomplishment of this design, but such as would be treason. The reasonable, the fair construction, that which obviously must have been in the mind of the giver and taker of the oath, is, that the word *same* had no other application than that which I have stated, viz. to bind to the use of physical strength for the attainment of the object. This is the correct, grammatical construction, pointed out, not only by the juxtaposition of the words, but by the general sense of the whole passage and of the whole oath; and it is impossible to put any other interpretation upon it, without sacrificing the public safety, and public law to a construction, which, I say, is forced and subtle. I do not dwell longer on this point, because truly it lies in a nut-shell, and if, by merely stating it, I do not shew that I am in the right, I despair of doing so by any length of argument.

Now, your Lordships have to consider, whether, supposing it were established that the obligation in the oath is to support endeavours to obtain annual Parliaments and universal

suffrage by physical strength, the act which was thus meditated, does, if accomplished, amount to treason. That such purpose would, if accomplished, have constituted treason, is proved by the concurrent testimony of all lawyers ancient and modern. The essence of treason consists in the application of force to accomplishment of an alteration in any general law. How did my learned friend get out of this dilemma? He maintained that physical strength for the accomplishment of any change in the laws of this kingdom, might by possibility be exercised without committing treason; and this he illustrated by supposing the case of the Speaker of the House of Commons being forced by threats and violence to consent to a bill for the abolition of the House of Lords, or of any of the branches of the constitution, which bill having passed the House of Lords, had its fate dependent on the Speaker's casting vote. That whimsical case can scarcely be called a case in illustration; but if it were necessary for me to enter into that supposed case, I would say without hesitation, that here was treason, not merely under the Act of the 36th of the King, but under what I may call the previous common law of the land. Many decisions might be referred to, to establish this. But I have no occasion to enter upon such an inapplicable question. The other instances of the possible exertions of physical force in the accomplishments of the purposes contemplated by the pannel and his associates are utterly absurd. It is said, that physical force may be exerted in the carrying of messages, in the erection of hustings, in the keeping off the crowds, and in various other ways which are all innocent, and which are all conducive to the attainment of the objects in view. I contend, that in these illustrations the Counsel for the pannel forget or overlook the distinction between the terms moral and physical, as employed to characterize human action. When a man delivers an oration, he is understood in common language to exercise his moral power or strength. But my learned friends must admit, that some physical force or strength is also at the same time exerted. To make the pen with which the political orator is to write, to carry the bench from which the political orator is to declaim, to keep off the crowd with which the political orator would otherwise be incommoded, are all actions subservient to the moral powers which are to be exerted. It is impossible to deny this without confounding the distinctions between terms moral and physical. No moral power can be exercised by man without physical exertion, but when the distinction to which I have adverted

is recollected, the illustrations which have been offered are either in themselves absurd, or are against the argument of the pannel, and must be classed with moral, and not physical exertions.

The obligation in the oath is, to employ moral and physical strength, as the case may require—that is, such moral strength, as the case may require, and such physical strength, as the case may require.—It is thus clear, that the terms of the oath do not bear a limitation to that innocent sort of force by the criminal example of which the learned Counsel illustrated his argument. According to the clear terms of the oath, such physical strength was to be employed as the case might require, for the accomplishment of the purposes which have been mentioned. What, I ask, are we to understand—what is the legal inference from the construction I have given? It is, that physical strength, as the exigency might require, was to be used for the accomplishment of a change in the constitution.

It is unnecessary to advert to the extreme absurdity of endeavouring to distinguish between the meaning of the words *strength* and *force*. They are certainly synonymous terms; and for the present purpose, at least, no distinction can be stated between them, either in popular or technical use. It is impossible to accomplish the alteration or subversion of any part of the constitution by physical force, without, in legal acceptation, levying war for that purpose, or compassing the King's death, or being guilty of some other treason. The application of numerical physical strength is nothing else but the levying of war. But if war be levied within the kingdom for any general purpose,—for the purpose of subverting any of the branches of the constitution,—that war is understood to be levied against the King, who, being the executive, is bound to protect the other branches of the Legislature. This is the import of all the authorities, to some of which I may now direct the attention of the Court.

The first authority to which I refer is that of Blackstone, who states the law in a brief and popular form. I quote from the 4th vol. p. 81.—"The third species of treason is, 'If a man do levy war against our lord the King.' And this may be done by taking arms, not only to dethrone the King, but under pretence to reform religion, or the laws, or to remove evil counsellors, or other grievances, whether real or pretended. For the law does not, neither can it, permit any private man, or set of men, to interfere forcibly in matters of such high importance; especially as it has established a sufficient power, for these purposes, in the

high court of Parliament: neither does the constitution justify any private or particular resistance for private or particular grievances; though in cases of national oppression the nation has very justifiably risen as one man, to vindicate the original contract subsisting between the King and his people."

The next authority to which I refer is that of *Foster*, a book which I observe is daily cited by English Judges, as an undoubted authority. I quote from page 211.—"Insurrections in order to throw down all enclosures, to alter the established law, or change religion, to enhance the price of all labour, or to open all prisons—all risings in order to effect these innovations of a public and general concern by an armed force are, in construction of law, high treason, within the clause of levying war; for though they are not levelled at the person of the King, they are against his royal majesty; and besides, they have a direct tendency to dissolve all the bonds of society, and to destroy all property, and all government too, by numbers and an armed force. Insurrections likewise for redressing national grievances, or for the expulsion of foreigners in general, or indeed of any single nation, being here under the protection of the King, or for the reformation of real or imaginary evils of a public nature, and in which the insurgents have no special interest—risings to effect these ends by force and numbers are, by construction of law, within the clauses of levying war; for they are levelled at the King's crown and royal dignity."

The only other authority to which I am to refer, is that of a Judge, than whom none was ever more highly or more deservedly honoured during a long and splendid career. I quote from the opinion of Lord Mansfield on Lord George Gordon's trial, as given in Howell's State Trials, vol. xxi. p. 643 and 644.—"There are two kinds of levying war:—One against the person of the King; to imprison, to dethrone, or to kill him; or to make him change measures or remove counsellors:—The other, which is said to be levied against the majesty of the King, or, in other words, against him in his regal capacity; as when a multitude rise and assemble to attain by force and violence any object of a general public nature; that is, levying war against the majesty of the King; and most reasonably so held, because it tends to dissolve all the bonds of society, to destroy property, and to overturn government; and by force of arms to restrain the King from reigning according to law.

" Insurrections, by force and violence, to raise the price of wages, to open all prisons, to destroy meeting-houses, nay, to destroy all brothels, to resist the execution of militia laws, or change religion, to redress grievances real or pretended, have all been held levying war. Many other instances might be put. Lord Chief Justice Holt, in Sir John Friend's case, says, " if persons do assemble themselves, and act with force in opposition to some law which they think inconvenient, and hope thereby to get it repealed, this is levying war, and treason." In the present case, it don't rest upon an implication that they hoped by opposition to a law to get it repealed, but the prosecution proceeds upon the direct ground, that the object was, by force and violence, to compel the Legislature to repeal a law; *and therefore, without any doubt, I tell you the joint opinion of us all, that, if this multitude assembled with intent, by acts of force and violence, to compel the Legislature to repeal a law, it is high treason.*

" Though the form of an indictment for this species of treason mentions drums, trumpets, arms, swords, fifes, and guns, *yet none of these circumstances are essential. The question always is, Whether the intent is by force and violence to obtain an object of a general and public nature by any instruments, or by dint of their numbers?* Whoever incites, advises, encourages, or is any way aiding to such a multitude so assembled with such intent, though he does not personally appear among them, or with his own hands commit any violence whatsoever, yet he is equally a principal with those who act, and guilty of high treason." Many other authorities to the same effect might be accumulated. I need not quote Hume, who gives a very luminous abstract of all the English authorities on the subject, and gives a summary which, in perspicuity and precision, is not surpassed by the boasted oracles of English law.

I say, therefore, on these authorities, it is utterly impossible to imagine that any change in the constitution can be accomplished by physical strength, without necessarily implying—not constructively, but necessarily implying—that it is done by force and violence. Levying war is nothing more than the application of an act which is treason. The form or mode of this act, may probably be that of levying war, to overcome or prevent resistance. It does not consist in having drums, or uniformity of dress, or the other usual appendages of warlike pomp. It does not consist in any particular kind of offensive arms, but in the application of a powerful and numerous force; and it is impossible that

strength for the accomplishment of any change in the constitution can be applied in any way, so as not to include the crime of treason, either of levying war, or of compassing the King's death, or of treason, under the statute 36. of the King. That which is accomplished by force can only be done *sub specie belli*, in so far as those terms have any intelligible meaning, and the same quality must characterize that which is intended or resolved to be done. I submit, therefore, that the construction given by the learned gentleman to the oath is erroneous, and that the only sound, and the only legal, and the only obvious construction of it, is that which I have stated to your Lordships.

It was stated farther, however, that, supposing a treasonable purpose to have existed, it is still necessary that it should be proved by and appear in the oath, and in the oath alone, in order to have the case brought under the statute. If I rightly understood this plea, two things were maintained, which I own appeared to me to be inconsistent: It was first maintained, that there is a want of specification in the indictment as to the mode in which the treason contemplated by the oath was to be effected; next, it was maintained, that in this indictment, charging the pannels with administering unlawful oaths, we are not entitled to go into any proof of acts of treason said to have been committed by them, for that would be to make the proof of one crime the proof of the commission of another. These I consider to be inconsistent objections.

Whether the treasonable purpose should appear in the oath itself, to bring the case within the statute, it is unnecessary to argue, because in the present case we do not desire to go beyond the contents of the oath. But in passing, I must deny that this plea for the pannel is sound, or at all warranted by the terms of the statute.

With respect to the other objections, I must observe that from the nature of the crime which the statute has defined, you neither can require, nor can you expect, in charging it, a specification of overt acts of treason. According to the previous argument of the pannel, the prosecutor is not entitled to prove any acts of treason, if such had been actually committed, and herein lies the monstrous inconsistency of his present argument. According to my view of the case, the specification which the pannel thus alternately opposes and demands, is morally impossible.

The charge here is not for the accomplishment and completion of the crime of treason;—the charge is for the conception, the imagination of treason, sanctioned by an oath,

and so far by an overt act consisting in the administration of an oath. When a crime has not been actually committed, it is impossible to state the circumstances of mode, time, and detail of execution. When a crime has been committed, it is of course an essential mode of that criminal act, that it was accompanied by time, place, and circumstances; and when a pannel is brought to the Bar on a charge of having committed a crime, the prosecutor can have no knowledge regarding it without knowing some of the prominent circumstances of its execution. But you must all be aware, that this rule cannot apply to what merely exists in intention. Of intention here, your Lordships have evidence by the oath, and the oath is such as the statute has made it, a crime, either to administer or to take. The crime charged is the administering an oath of a certain kind, and the mode of this act is admitted to be sufficiently detailed. It is possible that when the oath was administered, not one circumstance was finally resolved upon as to the detail of the execution of the treason;—it is quite possible that no one circumstance may have been fixed on as to the mode in which it was to have been carried into effect;—and no resolutions adopted as to the course of proceedings to be followed for the accomplishment of the atrocious purposes of the parties. Different plans may have existed in the minds of different conspirators;—there may have been numerous disputes on the subject:—and therefore, from the very nature of the statutory crime, it is impossible that any such detail as the opposite party require could be given; and it is enough to say that the statute has not required it. The nature of the treason which the oath bound the parties to commit is as much specified as it is possible for the public prosecutor, or for any human being, to specify. He has said, that the treason contemplated was that which consisted in compelling an alteration in the established laws by force and violence. That this would be treason, who can doubt? Whether, in the actual accomplishment of it, the criminals would have levied war against the King, in the sense in which the law uses these terms, or whether they would have compassed or imagined the death of the King, or whether both these legal crimes would have been perpetrated in the actual consummation of their purpose, who can pretend to say? To demand, that the public should divine and specify the mode in which the treason was actually to be perpetrated, is absurd and impossible, because the modes are various. To demand, that he should specify all the modes in which the intended treason ought

to be perpetrated, is plainly unnecessary and useless. It is sufficient for him to satisfy your Lordships, that the object contemplated by the oath could not be accomplished but by means of treason; and on this I have already stated my argument, in the words of the highest authorities of the law.

But it was also rather inconsistently urged, that if we had stated treason to have been committed with all its circumstances, we should not have been entitled to offer any proof of this averment, or to give any detail of the facts here, as the pannel is not on his trial for high treason; and one objection to the indictment is to the narrative of details with which the statutory offence is introduced. On looking into the statute, I think it is hardly necessary to go into this question, because it is not necessary that the commission of overt acts of treason should be alleged. I submit also, that what my learned friend, who immediately preceded me in behalf of the public prosecutor, stated on this part of the subject, was agreeable to the law of Scotland, and sufficiently obviates all that was urged in the way of objection to this part of the case.

In conclusion, it was strongly and powerfully urged, as a hardship in the case of the pannel, that, though acquitted on this occasion, he might be afterwards tried for treason. If he were to be acquitted of this charge, and afterwards brought to trial for treason, I suspect we should hear from his Counsel an effectual argument against such second trial. I content myself with saying, that our view and interpretation of the statute is totally and absolutely different from that of my learned friend, Mr Cranstoun, and that we conceive, from the terms of it, it is impossible such a second trial could be attempted. It is said, in the last clause, "That any person who shall be tried, and acquitted or convicted of any offence against this Act, *shall not be liable to be indicted, prosecuted, or tried again for the same offence, or fact*, as high treason, or misprision of high treason; and that nothing in this Act contained shall be construed or extend to prohibit any person guilty of any offence against this Act, and who shall not be tried for the same as an offence against this Act, from being tried for the same as high treason, or misprision of high treason, in such manner as if this Act had not been made."

This clause was intended to guard against two inconveniences. 1*st*, It was intended to protect the subject from being tried again as for treason upon the facts on which the statutory crime shall have been already prosecuted. In other words, it would be impossible to give in evidence, in

any subsequent trial of this prisoner, any of the facts which have been admitted to proof in the present case. 2*d*, It was intended to guard against the possibility of the enactments of this statute being construed to affect the principles of the law of treason previously established. If, therefore, the public prosecutor were to attempt to bring the prisoner to trial for treason after an acquittal in this case, he could not bring in evidence any one of the facts which were more or less connected with the present charge. This is the plain and necessary construction of the clause in the statute, and entirely removes the objection.

I have to call your attention to an authority upon the question that has been started relating to the specification of the crime. It has been maintained, that we are bound to specify the general nature of the conspiracy before we can proceed to prove the criminal intention of the parties. On this subject I may refer to the general terms in which an English indictment has been laid and found relevant. Such an authority, although it cannot affect the law of Scotland as a conclusive authority, yet is respectable in its way, and worthy of consideration. The case is to be found stated in Chitty on Criminal Law, vol. ii. relating to offences under statute 37. Geo. III. about administering oaths, &c. I submit to you, that in describing the illegal societies, the terms used in this English indictment are more general than those which the prosecutor has employed on this occasion, and to which an objection has been taken. On the whole, I maintain that the indictment before you, in the form in which it is laid, ought to be found relevant.

Mr Clerk.—This indictment proceeds upon an Act of Parliament passed in the 52d year of his Majesty's reign, against administering unlawful oaths; and accordingly certain clauses of the Act are set forth in the major proposition, as containing the description of the crime to be charged. This being the accusation, I need not remark that it would have been easy for the public prosecutor, if he had a case falling within the Act of Parliament, to confine himself to it in the minor proposition of his indictment, by stating in plain terms, that true it was and of verity, that the pannel had administered such an unlawful oath as that which was prohibited by the statute,—reciting the terms of the oath,—averring that an oath in these terms fell under the statute as being a treasonable oath,—stating how and in what respect it was treasonable, and to which of the different species of treason it applied,—specifying the time,

place, and occasion of committing the crime,—the relevancy of such an indictment might perhaps have been sustained. But the public prosecutor has not confined himself to the proper charge appearing from the major proposition of his own indictment, but has attempted most illegally to introduce matters totally unconnected with it, for the purpose of embarrassing the prisoner with accusations of a kind totally different, and which cannot be the subject of inquiry with reference to this charge.

In aid of his argument the public prosecutor has founded on an English case, in which one was convicted on evidence of circumstances to prove his intention in administering an unlawful oath. I mention this now, because it is proper to take an early opportunity of distinguishing that case from the present. I know very little of the English case referred to; but on hearing it read, I observed quite enough to perceive that it was a case totally different from the present—proceeding on another Act of Parliament, different in its terms from the Act which is now founded on by the public prosecutor. Under the former Act it is competent to prove the intention of the unlawful oath by circumstances extraneous to the oath itself, though that is not competent in the present case, in which the Court and jury must consider the terms of the oath and nothing else.

It has to-day been noticed more than once, that besides the Act of Parliament libelled on, there is another Act relating to unlawful oaths. But when you attend to the language of that Act, you will see the difference between the terms there used, and those which are employed in this Act of the 52d of the King, and you will see the reason of that difference, and how it ought to affect indictments founded on these Acts.

The indictment before the Court is founded on the Act passed in the 52d year of his Majesty, directed against those "who shall, in any manner or form whatsoever, administer, or cause to be administered, or be aiding and assisting at the administering of any oath or engagement, *purporting*, or *intending* to bind the person taking the same to commit any treason," &c. These persons are liable to the punishment of death, and every person who shall take the oath is punishable by transportation. By the 4th section it is enacted, "That persons aiding and assisting at the administering of any such oath, shall be deemed principal offenders, and liable to the same punishment of death." By section 5. it is not necessary to set forth the words of the oath, and it "shall be sufficient to set forth the purport of

such oath," or some material part thereof. By section 6, any engagement or obligation whatsoever in the nature of an oath, *purporting* or *intending* to bind the person taking the same, to commit any treason, &c. " shall be deemed an oath, within the intent and meaning of this Act." Now, by comparing this Act with the former one, it appears, that as the penalties are more severe, so the description of the crime is more limited than in the former Act. It is necessary that the oath or engagement shall purport or *intend* to bind the person taking the same to commit the treason, or other crimes punishable with death, which plainly signifies, that the purport or intendment of the oath only, or, the true meaning of its words, shall be considered in any prosecution against those who administer it. The purport of an oath has no reference to the intention, criminal or otherwise, of the party who administers it. The words of the oath may be innocent, and yet the intention may be very criminal. On the other hand, the words may be very mischievous, and yet the intention may be otherwise. But the Legislature imposes the penalty according to the purport of the oath, the intendment is the same with the purport in speaking of the oath; and either of these terms may be considered as synonymous with the true meaning of the oath separately considered, and without regard to the intention of the party who administers or takes it. In one view, this statute is uncommonly severe, inflicting, as it does, a capital punishment for administering an oath, which may be followed by no crime whatever. And even in taking the oath according to its purport or intendment, there is much severity, because the notion or opinion of the party who administers or takes it, as to its meaning and object, may be very different from the opinion of a Court of law as to its true construction, and so the real intent of the party may be much less criminal than the intent which is imputed to the oath itself, by the judgment of the Court. But, on the other hand, while the Act is full of severity on these points, it is lenient, in so far as it restricts the charge to the purport, intendment, or true meaning of the oath, and does not admit of a proof, which might be very loose and unsatisfactory, and very hard upon the prisoner to be tried, of an intention on his part, that went beyond the true meaning of the oath which he administered. For this Act does not allow it to be proved, that though the words of the oath were apparently innocent, yet that under colour of an innocent engagement the most criminal intentions were concealed or covered. In what way soever the public

prosecutor may make a charge of that kind, (which supposes, no doubt, that a great crime had been committed), it is plain that he could not make such a charge under this Act. And the statute tempers its own severity with lenity in another important circumstance. Those who aid and assist in administering the oath, are liable to the punishment of death; but those who were present at, and consenting to the administering the oath, are not liable as for administering it, and it seems to have been the intention of the Legislature that they should not be so liable.

This Act may be contrasted with that which was passed in the 37th year of the King, in which, though the punishment to be inflicted upon offenders was less severe (transportation for seven years) there is a much greater anxiety to prevent them from escaping; and, accordingly, the cases in which that punishment may be inflicted are much more numerous and comprehensive. It is enacted, 37. Geo. I. cap. 12. "That any person or persons who shall, in any manner or form whatsoever, administer, or cause to be administered, or be aiding or assisting at, *or present* and *consenting to* the administering or taking of any oath or engagement, purporting or *intended* to bind the person taking the same to engage in any mutinous or seditious purpose; or to disturb the public peace; or to be of any association, society, or confederacy, formed for any such purpose; or to obey the orders or commands of any committee or body of men, not lawfully constituted, or of any leader or commander, or other person not having authority by law for that purpose; or not to inform or give evidence against any associate, confederate, or other person; or not to reveal or discover any unlawful combination or confederacy; or not to reveal or discover any illegal act done or to be done; or not to reveal or discover any illegal oath or engagement which may have been administered or tendered to or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement; shall, on conviction thereof," &c. And by the third section it is enacted, "That persons aiding and assisting at, or *present at* and *consenting to* the administering or taking" of the oath, &c. shall be deemed principal offenders. Here is a very numerous collection of crimes; and as to the oath itself, not only are the persons liable to the statutory punishment, who are present at and consenting to the administering or taking of it, but every oath is comprehended, where it is of the nature specified, either in its purport or meaning, or where it is intended by the party administering or taking

it as an oath of that description, whatever may be its particular words. For the terms of the Act are "purporting or *intended* to bind;" *purporting* refers to the meaning of the oath; *intended* refers to the intention of the party. An oath purporting to bind, is *intended* by the party for that purpose. The purport of the oath, and the intention of the party, may be different; but the statute makes him liable for both; not merely the meaning of the words employed, but his own intention (possibly a secret intention), in using them, which may be much more mischievous or wicked than the plain or true meaning of the words. Accordingly, in the English case, which was tried upon the 37th of the King, the meaning, object, and intention of the party, distinct from the meaning of the words, was allowed to be proved. There was clearly room in that Act for the construction put upon it by the learned Judge who presided at the trial. But whatever be the construction of that Act, there is not the least room for such a construction in the present case, where the words, as well as the objects of this statute, are so very different. The words purporting, or intending to bind, plainly require *an oath*, which purports or intends to bind, and refer exclusively to the intending or intent of the oath, without regard to the intending or intent of the party, farther than his intent to administer or take that oath. And this was apparently admitted by Mr Solicitor General, when he observed, that the meaning, purport, and intention of the oath, are to be referred to in this argument, and not any conspiracy or extraneous circumstances. Thus, there is a reason sufficiently evident for excluding a proof of circumstances where the indictment is laid upon the 52d of the King, which might be admitted where the indictment is laid on the 37th of the King. And if it be competent by the 37th to prove the intent of the party by circumstances which do not appear from the oath, it was intended by the 52d that no evidence beyond the terms of the oath itself should be allowed for proving the intent of the party.

If the observations I have now made are well founded, the public prosecutor is entirely wrong in attempting to introduce in the minor proposition of the indictment a long detail of circumstances, with no other object than to establish the supposed wicked intent of the prisoner, by evidence that is extraneous to the administering of the unlawful oath. The prosecutor ought to have confined himself to that charge; and I must again observe, that he had it in his power to frame an indictment without objection, by the

proper recitals of the statute and of the oath, with proper allegations that the oath was prohibited by the Act of Parliament. But instead of adopting this plain method of proceeding, he has charged the pannel with an indictment that is exposed to innumerable objections.

The objection which I have just referred to should be sufficient to cast the indictment, if no other could be stated. But I shall remark upon some of the other objections. A good deal was said upon the competency of a general charge of high treason made in an indictment, without pointing out any particular species of treason. There can be no doubt whatever, that where the party is to be tried for the crime of high treason, a general charge of high treason made against him in the indictment would be good for nothing, and the charge would at once be dismissed. For there are so many different kinds of high treason, each of them distinguishable from all the rest, that it would be just as well to charge a man with having committed a crime, without saying what crime, as to charge him with having committed treason, without saying what treason. But it seems to have been thought by the prosecutor that in this indictment it is sufficient to refer to high treason generally without distinguishing between one treason and another, because the pannel is not to be tried for committing high treason, but for having administered an oath, purporting or intending to bind the person taking the same to commit treason. In a charge of this kind, it has been thought unnecessary to specify the treason which the oath purported or intended to bind the person taking the same to commit. But it seems to be obvious, that there is precisely the same reason to specify the treason in this case as in a trial for high treason itself. If it is unnecessary to specify the treason in this case, would it be sufficient to allege, that the oath purported or intended to bind the person taking the same to commit a crime, without specifying what crime, or giving any notice whatever to the pannel of the nature of that offence, which the oath purported or intended to bind the person taking the same to commit? It is plain, that in such a case the pannel would have no notice at all of the crime for which he was to be tried. An oath, binding the person taking it to commit a crime, may in every case be criminal; but an oath, leading to one crime, must always be distinguished from an oath leading to another, and a different crime. A defence completely prepared against the allegation, that the oath led to the commission of one crime, would be no defence at all, if the prosecutor

should not insist on that allegation, but on a different allegation; namely, that the oath led to the commission of another crime. The pannel might be prepared to defend himself as to the application of the oath to one-half of the crimes in the Statute-Book, and yet, having no distinct notice of the prosecutor's views, might be in no state of preparation to defend himself as to the application of the oath to another crime, of which he had no notice, and of which he had never thought. The same consideration shews, that among the different species of treason, that particular species should be pointed out in the indictment, upon which the prosecutor is to insist that the oath was applicable. It seems then to be indisputable, that the species of treason should have been alleged or assigned in this indictment, and that the total want of the specification in it is as objectionable as it would be in a trial for high treason. The objection is founded on the great and indispensable rule in criminal justice, that the pannel ought to have notice of the precise accusation against him, and the want of such notice in this indictment makes the case precisely the same as if the prosecutor had attempted to proceed without an indictment at all.

Another objection to the indictment was strongly and eloquently urged by Mr Cranstoun, that you cannot, for the proof of a crime that is charged, prove any other crime that is not charged. This was stated, on the authority of Mr Burnet, and of long practice. But one or two cases were cited against us by the Counsel for the prosecution. I do not admit that these cases were correctly stated; but, at all events, they do not establish that the prosecutor is entitled to prove the extraneous circumstances alleged in the present case. One of the cases related to the uttering of forged notes within Scotland, and it was said, that in order to prove the charge of uttering in Scotland, it was competent to prove the forgery of the notes, although that crime was committed in England. That was a case of *crimen continuum*, in which the criminal act was begun in one place, *continued* and completed in another. If I recollect right, a case occurred some years ago, in which a proof of one crime to prove another was allowed, and a person was convicted on a proof of that description. But that conviction was not approved of in another quarter, and whenever the circumstances attending it were known, the man got a pardon, in respect of the manner in which his trial had been conducted. One of your Lordships will probably support me in this account of the case to

which I now allude. I do not recollect the name of the party.

Lord Gillies.—My general recollection goes along with what Mr Clerk has stated; but I do not particularly recollect the circumstances.

Mr Clerk.—There are no *dicta* in the Work of Mr Hume, nor in that of Sir George M'Kenzie, inferring that a crime may be proved by another crime which is not libelled; and the authority of Mr Burnet, who was a very attentive observer of the proceedings in criminal cases, is directly against the doctrine. He lays it down expressly, that one crime cannot be proved by another. Thus the authority as well as the justice of the case, is on the side of the accused. But there is another objection to a proof of the conspiracy here mentioned. The allegation is in substance a charge of high treason; and would your Lordships allow such a charge to be proved, under this indictment, in direct contradiction to the Act of Parliament upon which you try crimes of treason? Without the intervention of a grand jury, treason cannot be tried. But if it is utterly incompetent to prove an allegation, it must be equally incompetent to make the allegation. No party is entitled to allege what it is not competent for him to prove. And, if the public prosecutor cannot be allowed to prove the crime of treason, it is impossible for him to proceed on this indictment.

To another objection, no sufficient answer has been made, that if the proof of treason is entered on, the trial is a public precognition; and if the result in this present trial does not satisfy the prosecutor, the pannel may be tried again upon the same facts. What was said in answer to this? From the very terms of the Act of Parliament the pannel cannot be tried again for the same offence. What is the same offence? The prisoner is now to be tried for administering the oath, and not for the crime of high treason. The two crimes are altogether different. The prisoner, if he is acquitted, cannot be tried for high treason, on account of his having administered a treasonable oath; but there is nothing in the statute against his being tried for a separate treason, extraneous to the charge of having administered the oath. But, according to the idea of the public prosecutor, the oath may be connected with overt acts of treason, which might be distinctly and separately charged; and if it were permitted to prove *these* overt acts

incidentally in this trial, the prisoner might, on such a precognition, be afterwards tried for treason.

Another objection is, that the requisite specification of the alleged conspiracy has been withheld by the prosecutor, the prisoner not having been favoured with the names of any of the persons alluded to as engaged in the conspiracy; and this objection is of itself fatal to the indictment. It is stated in the indictment, that the prisoner wickedly, &c. conspired, &c. with other evil disposed persons, to break and disturb the public peace, &c. But no one of the persons engaged in the conspiracy are mentioned. Why? We have not even been told that the public prosecutor *does not know* the names of these supposed persons; but if he was ignorant of their names, he should have said so; for in an indictment the public prosecutor should give a full detail of what he knows to the pannel, for the preparation of his defence. When a fact that should be stated, if known to the prosecutor, is unknown to him, he should at least state that such fact is unknown to him. He should do every thing to apprise the accused of the nature of the proof which he has to meet. Where that is not fairly done, the prisoner is entitled to object that he has not received the notice on the subject to which he is entitled by law. If a pannel be charged with a wicked conspiracy, he should be informed of the other persons with whom he is supposed to have been engaged, if the prosecutor knows who they are; and he is *presumed* to know them, if he does not state that they are unknown to him. How hard would it be if the law were otherwise? A conspiracy charged may be one of fifty supposed conspiracies. If the conspiracy is not identified by the names of the persons engaged in it, how can the prisoner know what the prosecutor really means to charge?

The other objections to this part of the indictment, though they may be less material, are still of very great importance, and their validity is recognized by Mr Hume, who employs many pages of his valuable work upon questions of this description.

The gentlemen opposite admit that fair and reasonable notice of facts must be given, and that Mr Hume says so. He does indeed say so. But, although they acknowledge his authority, they assert, that such notice is not always necessary. How does this agree with the opinion of Mr Hume, who says expressly that where the public prosecutor has it in his power to mention particulars, and where his doing so may be essential to the information of a pannel for

his defence, the Court will not oblige the pannel to answer without his getting a full and particular statement of the charge against him.

I come next to the argument maintained on the import of the oath. It is asserted, that an oath in certain terms was administered by the pannel. I do not profess to understand the precise meaning of this supposed oath. It is rather loosely and indefinitely expressed. To understand it precisely is, however, not absolutely necessary to the consideration of the question before the Court. Whether this be a lawful oath, is *not* the question. The oath may be extremely wicked, and perhaps there is no one who now hears me who does not think that there was a bad intention in it. But that is not the question before your Lordships. The question is, Whether that oath amounts to an obligation to commit high treason? Where a man is indicted for the crime of murder, the question is not, Whether he has been guilty in other respects? whether he has committed a robbery or any other crime?—and he has only to answer to the indictment for murder. The question here is, Whether the oath did purport and intend an obligation to commit high treason? For the oath is not said to be an obligation to commit murder or other felony. It is alleged to be an obligation to commit treason, and to that allegation the question is confined.

The averment of the public prosecutor upon this point is expressed thus in the indictment, "which oath or obligation did thus purport or intend to bind the persons taking the same to commit treason, by effecting by physical force the subversion of the established Government, laws, and constitution of this kingdom."

Mr Cranstoun, in his excellent speech, completely demonstrated the futility of this averment, both in its form and in its substance; but it appears to me that an argument much less complete and powerful would have been quite sufficient in such a case. For can it be possible to sustain an indictment alleging, with so little specification, an obligation to commit treason? Who does not know that there are a great variety of treasons distinguished from each other by difference of species, in the same manner and to the same effect as other crimes, which are known each by its species, and so distinguished from other crimes which do not belong to that species? Yet the indictment contains nothing to mark the species of treason which was to be committed. It appears from his words, that the prosecutor wishes to charge the prisoner with a delinquency that has a relation to some

treason, but that is all. His meaning goes no farther; and such is not a legal meaning when expressed in an indictment, as the substance of a charge to be tried. Indeed, it is so indefinite, that I do not understand what it really imports. Clearly it does not sufficiently describe any known treason. It seems to point at a treason to be committed by levying war. But is there any word about levying war in the indictment? Not one syllable; and yet it is acknowledged by every authority, from Coke downwards, that where a man is tried for levying war against the King, the levying of war must be specially set forth in the charge; and however brief and general our neighbours may be in drawing their indictments, (and they are more so than we) this specification is required, that the parties have conspired and actually engaged in levying war. (Mr Clerk here referred to Lord Coke and Sir Mathew Hale, with some observations relative to a charge of levying war.)

All this shows, that if in the present case the treason was to be committed by levying war, that species of treason should have been set forth. But in this indictment, though the oath is set forth, and certain words are used, intended as an averment of its criminal tendency, the averment is in terms so vague and general, that it cannot be gathered from them what the prosecutor means as to the species of treason which the prisoner had in view.

Thus the meaning of the oath, whatever it may be, is not sufficiently charged in an indictment proceeding upon the statute 52. of the King. And though an exposition of its actual meaning may be attended with difficulty, (perhaps no certainty can be had in expounding it), it is easy to shew, that it cannot be regarded as a treasonable obligation, however objectionable in other respects your Lordships may think it. In considering this obligation, I shall lay aside for a moment two circumstances that are immaterial to the question, Whether it is an obligation to commit treason?—one is, that it is an *oath*—another, that it binds to *secrecy*; for these circumstances, though they are of an aggravating nature, do not make the *obligation* more or less treasonable. As an engagement may be treasonable, without being in the form of an oath, so an engagement may be confirmed with an oath without being treasonable or criminal at all. In one remarkable transaction of this kind, an oath when proposed was rejected by the most determined of the conspirators.

No, not an oath.————————
———— what other bond
Than secret Romans, that have spoke the word,
And will not palter.———— ——

The nature of a conspiracy is the same with or without an oath, though an oath may be an aggravation of its wickedness. In the question, whether the engagement was to commit the crime of treason, I may therefore lay out of consideration the circumstance that it was in the form of an oath. Again, an oath of secrecy may be wicked, even although the intention of the persons who take it is innocent in other respects; and it will not make an engagement or obligation treasonable or otherwise, that the parties to it were sworn to secrecy. The question as to the true nature of the obligation, as being treasonable or not treasonable, evidently cannot depend upon the secrecy to which the parties were sworn. The form of an oath, and an oath too of secrecy, may and will greatly aggravate the offence that is committed by entering into any conspiracy, whatever its illegal object may be. But neither the oath itself, nor the obligation of secrecy, will make that treason which is not treason, nor change an obligation to commit any illegal act or crime, in itself not treason, into an obligation to commit the crime of high treason.

Keeping these important considerations in view,—that an engagement may be very criminal without being treasonable,—that the intervention of an oath does not make it treasonable,—and that even an oath of secrecy cannot have the effect to change a crime, how wicked and dangerous soever, into high treason, if the crime is not in itself high treason, but a crime of another character and description,—I shall offer some remarks upon the terms of this oath. And here I must repeat, that the oath may admit of no certain or precise construction. It may be understood in twenty different senses by twenty different persons. Perhaps no two men would agree with each other as to its precise meaning. But my present task is not to show the precise meaning of the oath, but a different and an easier task, namely, to shew that it does not import an obligation to commit high treason. For this purpose I shall offer a very few remarks upon it.

Nothing can be known of the nature of this engagement, but from the words of it. The party binds himself by an oath, and the first part of his obligation is expressed in these words: "That I will persevere in my endeavouring to form a brotherhood of affection amongst Britons of every

description, who are considered worthy of confidence; and that I will persevere in my endeavours to obtain for all the people in Great Britain and Ireland, not disqualified by crimes or insanity, the elective franchise at the age of twenty-one, with free and equal representation, and annual Parliaments." The purposes here expressed are, I presume, innocent of treason, though it would not be easy to tell the precise meaning of the words, and it is evident that they have no precise meaning. On the contrary, they are so extremely vague and indefinite, that every person taking such an oath seems to be at full liberty to put his own meaning upon it, without being at all exposed to the reproach of refusing to fulfil his obligation. Universal suffrage and annual Parliaments are very naturally supposed to have been the objects in view; but still there is nothing in the engagement itself, nor in the manner of expressing it, that is treasonable or even illegal in any respect. If the obligation had stopped with the words to which I have just referred, a prosecution for administering a treasonable oath would have been utterly absurd. But the obligation proceeds with other words, which are supposed in the indictment to be treasonable, " and that I will support the same to the utmost of my power, either by moral or physical strength, as the case may require." These words are the foundation of this indictment, and the material, if not the only question, as to the relevancy, depends upon their meaning, or rather upon the question, whether they admit of no other meaning or construction but one, the meaning alleged by the prosecutor, who argues, that they purport and intend to bind the party taking the oath to commit the crime of high treason. It is to be considered, whether the words have that treasonable meaning, or if that is not their meaning, it is evidently of no consequence what they mean.

The words of the oath now under consideration binds the party *to support the same*; and there has been some argument as to the meaning of *supporting the same*, as the words occur in this part of the oath. It was said for the prisoner, that when taken along with the previous words of the oath, the meaning of the whole is, that the party should persevere in his endeavours, and in particular his endeavours to obtain annual Parliaments and universal suffrage, and also to support the same, namely, the annual Parliaments and universal suffrage, when obtained and recognized by law. According to this construction, the oath intended any thing but treason. It was to support a legal establishment when

it should be obtained, and not even to support an attempt, though legal, to obtain a change of the existing laws. And this view of the oath seems to be perfectly well founded. On the one hand, there is an incongruity in saying, that the party will support his own endeavours; and, on the other, the expression, "support the same," is a relative that can only apply to the last antecedent, unless it appears from the grammatical construction, or from the meaning of the context, that the relative necessarily applies to former antecedents. But that is not the case here. There is a disjunction, not only in the sense, but in the grammatical construction, of the subject of annual Parliaments and universal suffrage, from the previous part of the oath. The more natural construction of the obligation to support the same is obtained, therefore, by referring it to a support of the wished-for changes when recognized by law. And there is another consideration, which leads to the same determination of the question. There are many rules for the interpretation of words; but the great rule of interpretation in the case of a criminal charge is, that in case of doubt, that construction which is most favourable to the accused must be adopted. And if the prisoner is entitled to the benefit of the rule I have just mentioned, I cannot see much difference between the interpretation offered on his part, and that which has been contended for by the prosecutor. For, whether the phrase, "support the same," shall be referred back merely to the proposed changes, when obtained, or to the endeavours to produce them, still it must be held, that the support to be given is intended as a legal, and not as an illegal support, and rather as a support of the law itself, to be appealed to in every stage of his endeavours by the person taking the oath, than as a support of illegal attempts to overturn it.

But the argument of the prosecutor is, that the clauses now under consideration do not merely bind the person taking the oath to support his endeavours at innovation, but to support the same to the utmost of his power, either by moral or physical strength, as the case may require. The prosecutor seems to think, that these words complete the treasonable obligation, and leave no doubt whatever as to the meaning, either of the party who administered, or of the party who took the oath. That there should be no doubt as to the meaning of these words, appears to be not a little extraordinary, when it is considered, that if they have any meaning at all, it is a meaning as vague, indefinite, and uncertain, as can be imagined. Yet the prosecutor thinks,

that they can mean nothing but treason, and he will not allow that any other meaning can be put upon them. Even the uneducated people, for whose use the oath was contrived, must, without all doubt, have understood, that it was the purport of these words to bind them to commit treason. These assertions are finely exemplified by the abortive attempt made in the indictment, to put any intelligible meaning upon the words. The prosecutor has not been able to apply them to any description of treason, excepting that constructive treason, which he would revive, after it has been abolished for several centuries. And here it is proper to notice an inexcusable gloss in the indictment, as to the meaning of the words now under consideration. The words of the oath are, "I will support the same to the utmost of my power, either by moral or physical *strength*;" but it is alleged in the indictment, that the treason was to be committed, "by effecting by physical *force* the subversion," &c. Here the word *strength* is changed into the word *force*, a word of a different meaning. It has been said, that the words are synonymous. If that is the case, why change the one for the other. But they are not synonymous. It is very true, that on some occasions either word may be used, without much, if any, difference of meaning. But the same thing may be said of words, that so far from being synonymous, have significations that are very different. The distinction between strength and force is quite obvious. Strength refers to *power*,—force to the *violent use* of that power. Force always implies violence, but strength does not. A precept in the holy Scriptures is thus expressed, "Thou shalt love the Lord thy God with all thy heart, and with all thy *strength*." How would this passage read with the word force instead of the word strength? To support with moral and physical strength does not mean that violence is to be used at all. So far from meaning that violence is to be used in attacking others, it does not necessarily mean *that* violence, which may be used in resisting the violent attacks of others.

Thus, it has been assumed, with very little ceremony indeed, that the moral and physical strength referred to in this oath, were to be applied for the purposes of treason. It seems to be just as reasonable to take it for granted, that the moral and physical strength were to be employed in the commission of any *other crime*. Can a reform in Parliament be promoted only by the commission of treason? No, it will be answered; but treason, if it was useful or necessary, was to be committed. There, if the parties were

not to shrink from the crime of treason if necessary for these purposes, it must be supposed that they would have been equally ready for the commission of any other crimes. But, I ask, whether, according to the meaning of this oath, the parties who took it were bound to commit murders, robberies, thefts, every sort of crimes, in order to promote reform in Parliament? Is it possible that any human being can be so destitute of charity and common sense as to put that construction upon the oath? When I bind myself to forward the purposes of reform to the utmost of my power, by moral and physical strength, am I bound to commit all or any one of the crimes which have been mentioned? Must I rob on the highway in order to promote annual Parliaments and universal suffrage? And if the oath is not an obligation to commit crimes generally, is it not absurd to say, that it is an obligation to commit the greatest of all crimes, the crime of treason? To maintain a proposition so monstrous, is the best example to prove the danger and atrocity of the constructive charges of treason. Suppose one of the persons who are stated in the indictment to have been engaged in a conspiracy, but whose names are not communicated, had been told that the oath being an obligation to support the plan of annual Parliaments and universal suffrage to the utmost of his power, by moral and physical strength; so he was required to commit some great crime, an assassination for example. If such a conversation among these conspirators can be supposed, the person addressed might surely answer, I engaged to do every thing in my power to obtain annual Parliaments and universal suffrage, but I have not engaged to do any thing that is against law—there is no such obligation in the oath. Could any one of the fraternity have replied, you are bound by the obligation, and must now perform the part you have undertaken: This assassination will support the cause of universal suffrage; and it is an act within your power? This reasoning would hardly serve; and if there is no obligation to commit a great crime, there is just as little to commit a small crime. The oath does not *purport* or *intend* to bind the party taking it to commit any crime whatever, or even to enfringe the slightest rule of morality.

Nor is there any difference between a mere paction in such a case and an obligation strengthened by an oath, how tremendous soever. As to the present question, the cases are quite the same.

But it is said, that if the intentions of the parties were so in-

nocent, why take an oath? Why this obligation to secrecy? I have answered that already. I do not know why there was an oath at all. I do not know why it was an oath of secrecy. I have heard, indeed, that some politicians have not the most absolute confidence in each other. There are animals known by the name of rats, of whom I sometimes read in the newspapers, who are said even to infest a certain great assembly. Some of those who were engaged in this association may perhaps have suspected that animals of that species might get amongst them, and, in order to prevent such an accident, they had recourse to the oath. Why was there an *oath* of secrecy? I see no reason why they should have bound themselves to secrecy. But is secrecy to imply the greatest atrocity of conduct? If they wished for secrecy, does it necessarily follow that they were to commit treason? Many enterprises require secrecy. That there were persons whom they did not wish to offend, might be a sufficient reason for their secrecy. It would be very unsafe, indeed, to infer the illegality of any combination from the circumstance that it is held together by an oath of secrecy, but it would be still more unsafe to infer a treasonable conspiracy upon such flimsy grounds. But the question is not, Whether the obligation to secrecy was right or wrong? The only question is, Whether there is in this oath an obligation to commit treason? The question is not, Whether the pannel committed treason in any way? but it is, Whether there is in the oath any obligation to commit treason? On these questions, I think it unnecessary to trouble your Lordships with any farther observations.

Lord Justice Clerk.—After the uncommonly able arguments which you have heard from both sides of the Bar, the question for your Lordships' consideration is, In what manner you are now to proceed in determining whether the present is a relevant indictment?

Lord Hermand.—I had no doubt in my mind, when I first saw the indictment, that it was relevant. But a great deal has been said to-day on the competency of alleging one crime in order to prove another. I have formed no opinion on the objections which have been stated to the indictment; and being desirous to understand them thoroughly, I wish to see them discussed in Informations. Several authorities are cited, particularly by Mr. Cranstoun, and it would be proper to have them fully stated, before giving any opinion with regard to them.

Lord Gillies.—I am of the same opinion, and strongly wish to see Informations.

Lord Pitmilly.—I am particularly anxious to consider that point which we have heard debated, and which is of general importance—I mean, the question as to the admission of the narrative part of the indictment to proof. With regard to the other objections, I have read all the authorities, and would have been ready to give my opinion upon them. It does not appear to me, that the cases of forgery alluded to are analogous to this case. If special acts of treason had been stated, the introductory part of the narrative might have been admitted to proof. But as the minor charge is not treason, but a different crime, my mind is not yet made up to the opinion that the indictment is relevant. As far as I am able to judge, I cannot help thinking that the pannel, if acquitted on this indictment, might be again tried for treason.

Lord Justice-Clerk.—I am much in the situation of my brother who has last spoken. In reference to the meaning of the oath, I have given great attention to what has been said; and I had looked into authorities, besides those referred to to-day. As to the other point, it has been most ably argued, and is deserving of most serious and deliberate attention—whether it be competent to let the public prosecutor into a proof of the narrative of this indictment. That is a point which, in reference to this important case, and all other cases of a similar nature, is deserving of the most mature consideration. This, too, is the first time that an indictment has been brought before us founded upon this statute. I am quite clear, therefore, that the solemn and regular manner of deciding the points in question, is to have Informations prepared, in which the arguments may be fully exhausted.

INTERLOCUTOR.

9th April 1817.

"The Lord Justice-Clerk, and Lords Commissioners of Justiciary, ordain parties' procurators to give in Informations upon the relevancy of the Indictment, to see and interchange these Informations, and to print, and lodge the same with the Clerk of Court in order to be recorded, and that within three weeks from this date: Continue the diet against the pannel till Monday the 19th day of May next,

at ten o'clock forenoon, in this place; and ordain parties, witnesses, assizers, and all concerned, then to attend, each under the pains of law; and the pannel in the mean time to be carried back to the Castle of Edinburgh.

THE

TRIAL

OF

WILLIAM EDGAR,

FOR

ADMINISTERING UNLAWFUL OATHS.

PRESENT.

Right Hon. DAVID BOYLE, *Lord Justice Clerk.*

LORD HERMAND.	LORD PITMILLY.
LORD GILLIES.	LORD RESTON.

Counsel for the CROWN.

Right Hon. ALEXANDER MACONOCHIE, *Lord Advocate.*

JAMES WEDDERBURN, Esq. *Solicitor-General.*

H. HOME DRUMMOND, Esq. | H. WARRENDER, W.S. *Agent.*

Counsel for WILLIAM EDGAR.

JOHN CLERK, Esq.	FRANCIS JEFFREY, Esq.
GEO. CRANSTOUN, Esq.	J. P. GRANT, Esq.
THOS. THOMSON, Esq.	HENRY COCKBURN, Esq.
JAMES MONCRIEFF, Esq.	J. A. MURRAY, Esq.

G. W. BOYD, W. S. *Agent.*

WILLIAM EDGAR was placed at the Bar.

LORD JUSTICE CLERK.—WILLIAM EDGAR, Attend to the Indictment against you, which is now to be read.

" WILLIAM EDGAR, present prisoner in the Castle of Edinburgh, you are Indicted and Accused, at the instance of ALEXANDER MACONOCHIE of Meadowbank, his Majesty's Advocate, for his Majesty's interest: That albeit,

by an Act passed in the fifty-second year of his present Majesty's reign, entitled, "An Act to render more effectual an Act passed in the thirty-seventh year of his present Majesty, for preventing the Administering or Taking Unlawful Oaths," it is *inter alia* enacted, "That every person who shall, in any manner or form whatsoever, administer, or cause to be administered, or be aiding or assisting at the administering, of any oath or engagement, purporting or intending to bind the person taking the same to commit any treason or murder, or any felony punishable by law with death, shall, on conviction thereof by due course of law, be adjudged guilty of felony, and suffer death as a felon, without benefit of clergy." And further, by section fourth of the said Act, it is enacted, "That persons aiding and assisting at the administering of any such oath or engagement, as aforesaid, and persons causing any such oath or engagement to be administered, though not present at the administering thereof, shall be deemed principal offenders, and shall be tried as such; and, on conviction thereof by due course of law, shall be adjudged guilty of felony, and shall suffer death as felons, without benefit of clergy; although the persons or person who actually administered such oath or engagement, if any such there shall be, shall not have been tried or convicted." And further, by section sixth of the said Act, it is enacted, "That any engagement or obligation whatsoever, in the nature of an oath, purporting or intending to bind the person taking the same to commit any treason or murder, or any felony punishable by law with death, shall be deemed an oath within the intent and meaning of this Act, in whatever form or manner the same shall be administered or taken, and whether the same shall be actually administered by any person or persons to any other person or persons, or taken by any other person or persons, without any administration thereof by any other person or persons:" Yet true it is and of verity, that you, the said William Edgar, are guilty of the said crimes, or of one or more of them, actor, or art and part: In so far as you, the said William Edgar, did, at secret meetings, and on other occasions, at Glasgow, or in the immediate vicinity thereof, in the course of the months of November and December 1816, and of January and February 1817, wickedly, maliciously, and traitorously administer, or cause to be administered, or did aid or assist at the administering, to a great number of persons, to the amount of several hundreds, an oath or engagement, or an obligation in the

nature of an oath, binding, or purporting or intending to bind, the persons taking the same to commit treason; which oath, engagement, or obligation, was in the following terms, or to the following purport:—"In awful pre- "sence of God, I, A B, do voluntarily swear, That I "will persevere in my endeavouring to form a brother- "hood of affection amongst Britons of every description, "who are considered worthy of confidence; and that I will "persevere in my endeavours to obtain for all the people in "Great Britain and Ireland, not disqualified by crimes or "insanity, the elective franchise, at the age of twenty-one, "with free and equal representation, and annual Parlia- "ments; and that I will support the same to the utmost of "my power, either by moral or physical strength, as the "case may require: And I do further swear, that neither "hopes, fears, rewards, or punishments, shall induce me to "inform on, or give evidence against, any member or mem- "bers, collectively or individually, for any act or expres- "sion done or made, in or out, in this or similar societies, "under the punishment of death, to be inflicted on me by "any member or members of such societies. So help me "God, and keep me stedfast." Which oath, or engage- ment, or obligation, to the foregoing purport, did bind, or did purport or intend to bind the persons taking the same to commit treason, by effecting by physical strength the subversion of the established government, laws, and constitution of this kingdom, and especially by obtaining annual parliaments and universal suffrage by unlawful and violent means. And, more particularly, you, the said William Edgar did, upon the 1st day of January 1817, or on one or other of the days of that month, or of December immediately preceding, or of February immediately following, at a secret meeting, held in the house of William Leggat, change-keeper in King-street, Tradeston, in the vicinity of Glasgow, or elsewhere at Glasgow, or in the immediate vicinity thereof, wickedly, maliciously, and traitorously administer, or cause to be administered, or did aid or assist at the administering an oath or obligation in the terms above set forth, or to the same purport, to Peter Gibson, John M'Lauchlane, John Campbell, and Hugh Dickson, all present prisoners in the Castle of Edinburgh; as also to James M'Ewan, now or lately carding-master at Humphries Mill, Gorbals of Glasgow, and M'Dowal Pate, or Peat, now or lately weaver in Piccadilly-street, Anderston, in the vicinity of Glasgow, who, conscious of their guilt in the premises, have absconded and fled from justice; as also to John Con-

nelton, or Congleton, now or lately cotton-spinner in Calton of Glasgow, or to one or other of them, and to other persons, whose names are to the Prosecutor unknown, the said oath, or engagement, or obligation, to the said purport, binding, or purporting to bind, the persons taking the same to commit treason, as said is. (2.) And further, you, the said William Edgar did, upon the 4th day of January 1817, or on one or other of the days of that month, or of December immediately preceding, or of February immediately following, at a secret meeting held at the house of Neill Munn, innkeeper and stabler in Ingram-street, Glasgow, or elsewhere at Glasgow, or in the immediate vicinity thereof, wickedly, maliciously, and traitorously administer, or cause to be administered, or did aid or assist at the administering an oath or obligation, in the terms above set forth, or to the same purport, to the said Peter Gibson, John M'Lauchlane, John Campbell, Hugh Dickson, M'Dowal Pate, or Peat, and James M'Ewan; as also to James Hood, present prisoner in the Castle of Edinburgh, Andrew Sommerville, John Buchanan, and James Robertson, all now or lately prisoners in the tolbooth of Glasgow, or to one or other of them, and to other persons, whose names are to the Prosecutor unknown, the said oath, or engagement, or obligation, to the said purport, binding, or purporting to bind, the persons taking the same to commit treason, as said is. And you, the said William Edgar, having been apprehended and taken before Daniel Hamilton, Esquire, one of the Sheriffs-substitute of Lanarkshire, did, in his presence, at Glasgow, on the 6th day of March 1817, emit and subscribe a declaration; and having been taken before Robert Hamilton, Esquire, Sheriff-depute of Lanarkshire, you did, in his presence, at Glasgow, upon the 7th and 8th days of March 1817, emit and subscribe two several declarations; which declarations, being to be used in evidence against you at your trial, will be lodged in due time in the hands of the Clerk of the High Court of Justiciary, before which you are to be tried, that you may have an opportunity of seeing the same. At least, times and places foresaid, the said oath, or engagement, or obligation, to the same purport, binding, or purporting to bind, the persons taking the same to commit treason, as said is, was wickedly, maliciously, and traitorously administered, or caused to be administered; and some persons did aid or assist at the administering thereof; and you the said William Edgar are guilty thereof, actor, or art and part. All which,

or part thereof, being found proven by the verdict of an Assize, before the Lord Justice General, the Lord Justice Clerk, and Lords Commissioners of Justiciary, you the said William Edgar ought to be punished with the pains of law, to deter others from committing the like crimes in all time coming.

H. Home Drummond, *A. D.*

LIST OF WITNESSES.

1 Robert Hamilton, Esquire, Sheriff-depute of Lanarkshire.
2 Daniel Hamilton, Esquire, one of the Sheriffs-substitute of Lanarkshire.
3 Daniel M'Callum, clerk to John Drysdale, sheriff-clerk of Lanarkshire.
4 Mathew Burns, clerk to George Salmond, Procurator-fiscal of Lanarkshire.
5 John Leslie, clerk to the said John Drysdale.
6 Joseph Reid, writer in Glasgow.
7 Alexander Calder, sheriff-officer in Glasgow.
8 James Thomson, clerk to the said John Drysdale.
9 Alexander Hunter, changekeeper, Old Wynd of Glasgow.
10 Marion M'Laren, or M'Lachlan, now or lately servant to the said Alexander Hunter.
11 John Robertson, innkeeper and stabler, Gallowgate, Glasgow.
12 Agnes Campbell, wife of Thomas Dow, steam-boiler maker and smith at Girdwood and Company's foundry in Hutchesontown, in the vicinity of Glasgow.
13 Janet Rentoul, now or lately servant to Neill Munn, innkeeper and stabler in Ingram-street, Glasgow.
14 Alison Wilson, now or lately servant to the said Neill Munn.
15 Mathew Fyfe, spirit-dealer in Wilson-street, Glasgow.
16 Jean Boyd, wife of the said Mathew Fyfe.
17 William Leggat, changekeeper in King-street, corner of Centre-street, Tradeston, in the vicinity of Glasgow.
18 John Mitchell, weaver, residing in Wilkie's Land, Charles-street, Calton of Glasgow.
19 Hugh Dickson, present prisoner in the Castle of Edinburgh.
20 Peter Gibson, present prisoner there.
21 John M'Lauchlane, present prisoner there.

William Simpson, present prisoner there.
James Hood, present prisoner there.
John Campbell, present prisoner there.
Thomas Sinclair, present prisoner there.

H. Home Drummond, *A. D.*

LIST OF ASSIZE.

County of Edinburgh.

Francis Carteret Scott of Ballerno.
Richard Wooley of Whitehouse.
James White, tobacconist in Dalkeith.
Robert Lyle, baker there.
John Wood, merchant there.
John Brown, farmer, Carrington.
Andrew Johnston, farmer, Primrosebarns.

County of Haddington.

William Aitchison, junior, of Drummore,
John Sommervill of Moreham.
William Hay, farmer, Howden.
John Brodie, farmer, West Fenton.
Robert Hope, farmer, Fenton.

County of Linlithgow.

William Glen of Mains.
William Dawson, younger, Bonnytoun.
John Trotter, farmer at Stacks.
Robert Taylor, residing at Blackness.
George Turnbull, farmer at Northbank.

City of Edinburgh.

Robert Fraser, jeweller in Edinburgh.
Thomas Richardson, merchant-tailor there.
David Whitelaw, watchmaker there.
Peter Peddie, trunk-maker there.
William Trotter, upholsterer there.
Alexander Russell, coach-maker there.
John Inverarity, upholsterer there.
George Yule, merchant there.
Alexander Ainslie, saddler there.
John Steel, confectioner there.
James Innes, gunsmith there.
Daniel Forrest, hosier there.
Peter Sawers, saddler there.
George Hunter, merchant there.

William Ross, tailor there.
Charles M'Lean, draper there.
John Laing, saddler there.
John M'Pherson, tailor there.
Francis Davidson, confectioner there.
William Cooper, boot-maker there.
William Dumbreck, hotel-keeper there.

Town of Leith.

John M'Kenzie, merchant in Leith.
Archibald Cleghorn, corn-merchant there.
Thomas Morton, ship-builder there.
Robert Paterson, painter there.
Charles Robertson, merchant there.
John Sanders, agent there.
John Glover, wright there.

AD. GILLIES.
D. MONYPENNY.
DAVID DOUGLAS.

LORD JUSTICE CLERK.—William Edgar, What do you say to this Indictment?—Are you guilty or not guilty of the charges contained in it?

WILLIAM EDGAR.—Not guilty, my Lord.

Mr CRANSTOUN.—Before the prisoner pleads to the indictment which has just been read, I have to state to your Lordships, that he is advised to object to the competency of the present proceeding; and I humbly submit that this is the proper time for stating the objection to your Lordships.

Your Lordships will recollect, that the prisoner at the Bar was lately indicted upon the statute the 52d Geo. III. for the crime of administering unlawful oaths, binding, or purporting or intending to bind, the takers to commit the crime of treason. That indictment was regularly served upon the prisoner—he was brought to the Bar—he pleaded not guilty—and your Lordships, upon hearing a debate upon the relevancy, appointed informations to be given in, and continued the time for doing so until this day.

My Lords, that criminal prosecution is still in dependence against the prisoner. The diet has not yet been deserted as far as I know. I need not tell your Lordships, that his

Majesty's Advocate cannot desert a prosecution, either *simpliciter* or *pro loco et tempore*, without the permission of your Lordships. By deserting *simpliciter*, I mean here, deserting with a view to try upon a new indictment for the same crime.

While the first prosecution was thus in dependence, his Majesty's Advocate has thought fit to execute a second indictment against my client, calling him to answer at your Bar for precisely the same crime as was charged in the first indictment. I submit to your Lordships, that this proceeding is altogether incompetent—because the diet in the first indictment is not yet deserted; and that it would be equally incompetent to proceed at present on the second indictment, even if, on the motion of the Lord Advocate, the first should now be deserted. I shall state, in a very few words, the grounds upon which I think our objection is irresistible.

It is known to your Lordships, that by the criminal law of this country, as now firmly established, every person who is brought to the Bar upon a criminal charge is entitled to have the *inducia* of fifteen free days. What benefit could be derived from the *inducia*, if he could be brought to trial, and during the dependence of that trial *inducia* might be running against him all the while for another trial on account of the same crime? Why, he would be placed in a situation in which the law certainly never meant him to be placed; he would be perplexed and embarrassed, by being under the necessity of defending two actions subsisting together at one and the same time. Look how far this principle, if once admitted, would go. The prisoner is indicted, he is brought to the Bar, an objection is stated to the relevancy of the indictment, and your Lordships, after an argument of twelve hours upon the relevancy, find the indictment irrelevant. The next moment his Majesty's Advocate takes a new indictment out of his pocket, and the prisoner is immediately again put upon his trial for the very same offence. Well, the second day you have an argument upon the relevancy of this second indictment, an argument which also lasts twelve hours; and when that indictment is found irrelevant, what happens next? A third indictment is produced by his Majesty's Advocate, and he insists that the prisoner shall again be tried. And thus there might be fifteen different indictments, under which the prisoner is actually kept upon his trial for fifteen days, being the whole *inducia* contained in the first indictment; and upon the sixteenth charge, the pursuer might be brought to trial upon a rele-

vant indictment, and without having had one moment's time to prepare his defence.

I may be told that this is stating an extreme case, one which is not likely to happen. Such a case certainly may not happen while my friend is Lord Advocate; but if what I have stated might happen in an extreme case, it is enough for my argument. Every possible danger of this kind ought to be guarded against, for experience teaches us that criminal prosecutions are often resorted to from ambition, revenge, and other improper motives.

As a general rule, therefore, in the law of Scotland, I affirm, if a person is indicted for a crime, and if he comes to the Bar, and pleads to that indictment, then there is a depending process against him, *during which* he cannot again be cited to answer for the same charge, and in that way be deprived entirely of the benefit of his *inducia*. The moment he has pleaded to his indictment, it is incompetent to have another indictment running against him for the same offence.

There are various ways in which I might illustrate the hardship and oppression which would result from a different rule. Suppose a pannel has pleaded to an indictment, and has been actually put upon his trial here, if the objection which I am now stating is not a good objection, his Majesty's Advocate might raise another indictment, requiring him to take his trial at a distance, for instance at Aberdeen, the day after the diet of the first indictment, which is to be tried at Edinburgh, and that for the very purpose of deserting the first indictment, and proceeding upon the second. In this very case it is possible that the pannel may have fifty witnesses to examine, and of course he is bound to have them here to-day, in case the trial should go on on the former indictment. But if the former is deserted, and a new one called at Aberdeen to-morrow, in what manner, I would ask, is the pannel to transport his witnesses to Aberdeen? The *inducia* are given by law for the very purpose of protecting the accused against surprises of this kind; but the practice attempted on the part of the Crown would defeat that purpose.

It is in vain to say that the Court would interfere to give redress, if an oppressive proceeding of the nature I have supposed were to be attempted. That plea was once urged, when a prosecutor, in defiance of all law, had not given the ordinary *inducia*, and I am sorry to say, that it was listened to by the Court. The libel contained *inducia* of twelve days only; and when the pannel complained, he was told,

that if he had applied to the Court for longer time, it would have been allowed. The objection was accordingly repelled, but, as Mr Hume justly observes, it was most improperly repelled. If the ordinary rules of law, settled by the practice of centuries, are to be dispensed with, and a prisoner rolled over upon the Court for redress, is it enough to say, that he will obtain as a favour, what he is entitled to demand as a right? If this be the case, all security, all liberty is at an end.

Thus there are various hardships, and very great hardships, which would result, if you once admit, that after a person has pleaded to one criminal prosecution, and while it is in dependence—for example, while informations are preparing on the relevancy, the *inducie* of another prosecution for the same crime may be current.

I do not say that the question which I am now stating to your Lordships has been decided *in terminis* by the Court. If it has so been decided, it has escaped my observation, and the learned counsel upon the other side of the Bar will mention the cases in which the objection has occurred, and has been repelled. For any thing that I know, there may be cases of trials having proceeded on indictments raised in the same manner as the present; but that must have happened where the objection was not stated; and you will easily see, that in many cases it might be for the interest of the pannel to wave the objection. In many cases a prisoner would wish to be tried, without any *inducie*; for instance, in the case of a charge of a subordinate or inferior nature, there may often be an interest on the part of the prisoner to wave this objection. But what I found upon is this, that, as far as I have been able to discover, this objection has not been stated and repelled *in terminis*.

But though I cannot refer to a precedent in which it has been sustained, I think there has been a case decided which appears to me to proceed on the very same principle, and to illustrate and support the argument which I have now the honour to maintain. There are instances of half a dozen indictments having been served upon a prisoner, one after another, and calling him to attend at the Bar at different times; and, in particular, that happened in the celebrated case of Colonel Francis Charteris. Four different libels were executed against him to take his trial for the same crime, all calling him to appear in Court at different times; and when he appeared upon the first of these indictments, he stated that he was not bound to plead at all, until the Lord Advocate selected the

indictment upon which he intended to carry on the trial; and the Court found, or it was admitted on the part of the prosecution, that this was necessary; and accordingly, before the trial proceeded, it was necessary to desert three of the indictments—and when they were so deserted, then, and not till then, was Colonel Charteris required to plead.

Is not that case precisely the same *in principle* as the present? For, if before Colonel Charteris pleaded, every indictment then in dependence but one was necessarily deserted,—now that my client has pleaded, there being but one indictment when he pleaded, it follows for the same reason, that other three indictments cannot be hung over his head. If you do not support this objection, you place my client in that situation in which it was decided that Colonel Charteris could not be placed. If Colonel Charteris had pleaded to his first indictment, while the others were in suspense, he would have been in the situation in which it is wished to place my client at present. The principle of the rule in Colonel Charteris's case is so well laid down by the learned author of the Commentaries, that I cannot refrain from stating it in his words. In the 4th vol. of Mr Hume's Works, or the 2d vol. upon the Law of Scotland, as to the trial of crimes, page 84. after having first stated that the Court erroneously and improperly, in two preceding cases, had repelled that objection, he proceeds to state the case of Charteris. "On the one hand, the prosecutor cannot say that he is hardly dealt with in being put to make his choice among his several libels, whereof some one at least ought to be correct, and executed in proper form. On the other hand, the pannel suffers a disadvantage in conducting his defence, unless such an election shall be made. For there may be blunders in the body of one of those libels, or in the list of witnesses, or in the manner of execution against the pannel or witnesses, which may be more or less available to him, and may perhaps serve to his acquittal, if the prosecutor insist exclusively on that one. Whereas, according to the latitude allowed in Lindsay's case, even after making good such objections, the pannel in nowise profits by his success therein, and is thus perplexed and encumbered with the care of a double set of pleas. I learn from a printed petition and answers, (for they are not in the record), that in the case of Colonel Charteris, the pannel had been served with no fewer than four libels, calling him to several diets, and otherwise differing one from another; and of this proceeding he complains, and insists that the prosecutor shall specify the dittay on which he intends to go to trial. The

prosecutor does so accordingly, in his answers to the petition; and it appears from the informations in the case, that the Colonel never had to plead to any of those libels but one, which alone appears in the record."

You therefore see, that before Colonel Charteris would open his mouth upon that indictment, he was entitled to have every other indictment for the same crime put out of the way.

The Lord Advocate has followed a different course here, for he first raised one indictment, to which the pannel pleaded; and, after your Lordships had ordered informations, thereby continuing the dependence of the trial, which at this very moment has not been deserted—I say pending that process to which the prisoner pleaded, he has been cited by another indictment, which is also now over his head; and he, and his counsel if they have done their duty, have been encumbered and perplexed fifteen days in attending to different sets of pleas in these prosecutions. If the objection in the case of Colonel Charteris was sustained, you ought to sustain the objection in this case also.

It may perhaps be maintained, but there is no principle to bear out the statement, that the second indictment virtually imports an abandonment of the first indictment. An indictment may be abandoned before the pannel is brought into Court and pleads. The Lord Advocate may bring twenty indictments; but before bringing the pannel to plead, he must desert all of them but one. And I ask, Can any case be pointed out to me, of three or four indictments brought against an individual, and of his being brought to trial, not upon the last, but on the first of these indictments? The principle is, that, where several have been served upon a pannel, the second is understood to be a virtual desertion of the first, the third of the second, and so forth. The prisoner is always entitled to plead to one only, and that is always the last. But the principle by which a subsequent indictment is held to imply an abandonment of a former indictment, cannot apply in the case before us; for the moment that issue is joined between the prosecutor and the pannel, it is no longer in the power of the public prosecutor to abandon the indictment, unless he do it for ever. When the prisoner has pleaded to an indictment, he is then *in manibus curiæ*, and the prosecutor must have the express sanction of the Court for the deserting of the libel. This is laid down in so many words by the learned commentator, at the 28th page of the volume already mentioned: "It is also a case which some-

times happens, that, though still resolved on bringing the pannel to justice, the prosecutor sees cause, however, not to insist in the trial of him on that particular libel. Because, perhaps, he has discovered some flaw in it, or the executions thereof; or on account of new and material evidence which has lately come to his knowledge, and which requires an addition to his list of witnesses, or may occasion a difference in the laying of his charge. In situations of this sort, which, notwithstanding all due pains on the prosecutor's part, must sometimes happen, it is necessary to the advancement of justice, that he have the power of deserting his present libel, without prejudice to his right of insisting anew, at the time, and in the form, which he shall find advisable. If indeed he had the absolute and uncontrolled privilege of throwing up his process as often, and for what causes soever he pleased; this would be dangerous to the pannel, who might thus, under false or affected pretences, be harassed with repeated libels. Our custom does not therefore trust the prosecutor to that extent, but allows him only to move the Court, to desert the diet *pro loco et tempore*; in which request they may refuse to gratify him, if they see cause to believe that he intends any thing oppressive or improper, or if they are not satisfied that there are good reasons for such an indulgence. It is true, the style has crept into practice, of the *prosecutor* deserting the diet; because it so often happens that his motion for such a purpose is successful. But in truth this is a loose and inaccurate expression. For the act of desertion is not his act, but that of the Court; without whose permission and deliverance the process cannot be withdrawn in this temporary form. And, indeed, if he be a private prosecutor, the Court have already caution from him to insist on that libel; and to this they may hold him, and refuse to give him new letters, if they see cause. Accordingly, in the debate on the case of Archibald, (March 1. 1768), the prosecutor frankly disowns all pretensions to any such arbitrary power. His Majesty's Solicitor represents, that he observes in the information, on the part of the pannel, very alarming consequences are endeavoured to be grafted on the doctrine pled in behalf of the prosecutor in this case; as if it gave to the public prosecutor a very arbitrary power of oppressing the subjects in this country, by deserting diets as often as his fancy suggested: but as all the alarming consequences pointed out are founded upon the supposition of a doctrine which he never meant to plead, he thinks it now proper to have this matter clearly understood; as the public prosecutor never pleaded, nor does he

desire it to be believed by the subjects in this country, that he has any arbitrary power of deserting diets without the authority and intervention of Court: which circumstance totally removes all those apprehensions which the counsel for the pannel has grafted upon the supposition, that an arbitrary power of deserting diets was claimed in this, or in any other cause, by the public prosecutor." And it is stated in still stronger terms in his notes as to desertions *simpliciter*, and desertions *pro loco et tempore*.

If this were an open point, I cannot hesitate for a moment to believe, that your Lordships would decide it in the manner which I now suggest; for the hardships which would arise from any other decision are plain and great. But I submit that it is not open; for though it was not decided *in terminis* in the case of Colonel Charteris, the objection there maintained is exactly the same in principle. Upon these grounds, I humbly submit to your Lordships, that the objection which I have stated is well founded.

I think I have already observed, that the mistake cannot be rectified by the public prosecutor deserting the former prosecution at this stage of the business. The reason is, that the pannel has already suffered all the perplexity and embarrassment which two co-existing prosecutions for the same crime must necessarily occasion; and he has in consequence been deprived of the benefit of his *inducia*. Both indictments have been suspended over his head; and the desertion of the first now at the very hour of trial, will never authorize you to proceed with the second. To what hardship was Colonel Charteris exposed in going to trial upon one indictment, while others were hanging over his head, to which the pursuer is not exposed in the present case? Colonel Charteris knew well, that if he was once sent to a jury in one indictment, the rest were for ever at an end. But the Court thought, that he was not bound even to plead with four indictments hanging over him; that he was not bound to take his chance of the relevancy being argued in one of these prosecutions, and the verdict returned in another. You would not force him into the preliminary step of pleading and arguing the relevancy until every indictment but one was withdrawn. Now, I beg leave to ask the question, where is the difference between pleading to one indictment, and having other three afterwards served, or having all the four served, and being compelled to plead to one? In the first case, just as much as in the second, the four prosecutions are co-existent, and that is the hardship complained of. The prosecutor has placed my

client in the very same predicament in which you found Colonel Charteris could not be placed.

I maintain, therefore, that the second indictment was served erroneously, because it was served while the prisoner was under trial for the crime charged in that indictment. For it cannot be disputed, that the prisoner is under trial from the moment that he pleads, although, according to our forms, the Jury have not then entered upon their functions.

Now, if a prisoner can be brought again and again to trial for the same crime, and he may be brought twenty times to trial for the same crime, while the Act 1701 is suspended, as it is at present, it is but fair that he should have fifteen free days between each of these trials; namely, the ordinary *induciæ* of the law.

If you once admit the principle on which the Lord Advocate proceeds, you might have these twenty trials going on for twenty consecutive days, without respite either to the prisoner or to yourselves. I beg to ask, If this would not only be to harass and perplex him, but to deprive him altogether of the benefit of his *induciæ?* Could fifteen days so spent be called fifteen days allowed for preparation? The prisoner would be perfectly confounded, not knowing upon what day, or under what indictment, he was to be sent to the Jury.

I humbly submit, therefore, that the point is clear and established in principle, that the *induciæ* of no one indictment can, even after the prisoner has pleaded to another indictment for the same crime, consequently, although your Lordships were to allow the Lord Advocate to desert the first indictment, that the prisoner, not having had his *induciæ* under the second, is not bound to plead to it.

Mr Home Drummond.—I do not think that it is necessary for me to say much in answer to this objection, as the point has been settled in practice long ago. The whole question in discussion here seems to be, whether it is necessary now for the prosecutor to pass expressly from the other indictment, or whether it is already virtually passed from? The learned gentleman was quite incorrect in speaking of the prosecutor "deserting the indictment," instead of "passing" from it; as it is not the *indictment* which is said to be deserted, but *the diet;* and besides, the desertion is not the act of the prosecutor, but of the Court. If the diet were to be deserted, there might be a doubt whether both indictments would not thereby be extinguished, as the diet of both hap-

pens to fall on the same day. Farther than this, the prosecutor can have no interest in objecting to any mode of extinguishing the first libel. He could have no other motive in not having recourse to the form of moving the Court to desert the diet; and he conceived that he was following a simpler course, and one less calculated to create trouble and delay.

I happen to have looked into the practice of late years as to the point in question, and I maintain, that the proceedings in this case are agreeable to the practice which your Lordships have sanctioned, and shall mention the cases that have occurred. Lindsay Crawford was indicted to stand trial on the 9th of January 1812. The diet was continued, on the motion of his own Counsel, to the 3d of February; before which 3d of February new criminal letters were raised against the pannel; and the trial proceeded on the criminal letters, without any notice being taken of the first indictment, though the trial on the criminal letters took place on the same day, the 3d of February.

Mr MURRAY.—Had he pleaded?

Mr DRUMMOND.—He had not. He had come into Court, and the diet was continued upon the motion of his own Counsel. It is of no consequence to the principle of the objection whether the pannel pleaded to the indictment or not; but, at all events, there are cases enough where this proceeding has taken place after pannels have pleaded.

The very next case, that of Thomas Somerville, was one of that description. He was indicted to stand trial on the 25th of January 1813. On that day a long pleading took place upon the relevancy, consequently he did plead to the indictment. There could not have been a debate, if he had not pleaded not guilty. Informations on the relevancy were ordered to be given in on the 15th of February; and before that time, new criminal letters were raised, which fell upon the same day, the 15th of February. I took a note at the time of a conversation on the Bench as to the particular objection which has now been stated, and which I beg leave to read. I see two gentlemen on the other side of the Bar, who can correct me if I am inaccurate, who I remember to have been Counsel in that cause. "Lord Hermand asked, if it was not proper in such a case to desert former diet *pro loco et tempore?*—Objected, That former indictment abandoned by service of this. And Court said they would adhere to the practice,

and case proceeded." I had added this remark to the note: "Had not the diet fallen upon the same day, it would have dropped out of the record, by the passing of the day without its being called." Now, can the prosecutor be compelled to appear or insist in any libel he does not choose to insist in? and if not, must not the diet fall and be dropt for want of an instance?

Upon the 13th of June 1814, John Horn was brought to the Bar on a charge of forgery. Pleadings at great length took place on the relevancy of the indictment, the pannel having pleaded not guilty. Informations were ordered to be given in on the 6th of July, and similar proceedings took place. Before that day a new indictment had been served, the diet whereof fell upon an earlier day, and upon that day informations were ordered of new upon the new indictment.

There was also the recent case of the Thistle Bank of Glasgow against Bell and Douglas. After the pannel Douglas had pleaded guilty, informations were ordered, and a new indictment was in the mean time served upon the pannel, which was understood, as in the former cases, to have extinguished the first.

These are all the cases since 1811, in which it was possible for this objection to occur; and the same practice took place in all of them that has been followed here, which could not have happened if this objection had been well founded. The plea of its having passed *sub silentio* cannot be maintained, as it is the duty of the Court to see that every thing shall go on according to the proper forms of law, a duty which the Court at all times discharge, whether the pannel's Counsel think it for their interest to state objections or not. A stronger example of this cannot be given than that very case of Douglas, where the Court ordered informations on the relevancy of an indictment to which the pannel had pleaded guilty.

The embarrassment of the pannel with different libels, and the other evils complained of, are entirely imaginary. The service of a new indictment, or at least the calling of the diet, extinguishes the old one; and there is no subsisting indictment but the last one which is served on the pannel. If any diet were to be deserted at all, it would be the diet of the last, as no notice could be taken of the first. If, however, your Lordships should have any doubt upon the subject, the prosecutor will pass from the indictment, or will move for a desertion, or follow any course that the Court may think best calculated to put an end to the first indict-

ment, if its existence should still be thought possible. He has no wish to maintain any argument on the subject; only it is his opinion, that by the service of a second indictment he has abandoned and virtually passed from and extinguished the first.

LORD ADVOCATE.—After the statement of the practice which has been given by Mr Drummond, I do not mean to detain you by entering into a question, which I understand to be shut by the uniform practice of your Lordships. But I think it necessary to advert to one point in Mr Cranstoun's speech. He stated, that, for some time past, the Counsel for the pannel had thought it incumbent on them to attend, not only to this indictment, but also to the last, in which informations were ordered on the relevancy. He ought to have stated—and as I know his fairness, I think it must have been by omission that he did not state—that more than a month before the pannel was served with this indictment, notice was given to his Counsel by myself, that it was not intended to prosecute the first indictment, but to serve him with another. I think it necessary, in vindication of the public prosecutor, to state this to your Lordships, as it shews there was no intention to oppress the pannel, or to give his Counsel any needless trouble.

On the point itself, I state to you, that not only since 1812 has this point been understood to be shut, but in all the cases before, this was the uniform practice. In the case of Mendham, there was a long argument whether the issuing of notes in England could be stated in this Court, on the ground of the crime in the one country being a continuation of the crime committed in the other. After the pannel pleaded upon that, informations were ordered. It was then thought the better mode of proceeding to abandon that indictment, and to give a new one, which was done while informations were in dependence; and in that case, where it is known to your Lordships that every attempt was made to save the individual then at the Bar, this point was understood to be shut.

The point just comes to this, that, where the public prosecutor has raised an indictment, it is competent to him, antecedent to pleading before a Jury, to abandon the indictment and raise a second. It appears to me that the circumstance of a pleading on the relevancy having taken place, cannot prevent the public prosecutor from abandoning the indictment when he thinks fit, and bringing a new indictment. Taking both the principle and invariable practice

into view, there cannot be a doubt in the case. In support of what was stated by Mr Drummond, the case of Colonel Charteris is in point. If it had not been held, that the last indictment was a virtual passing from the former ones, all of them would have appeared on the record. But here is only one upon the record; therefore the service of the second was a virtual abandonment of the first. Upon these grounds, I have no doubt of the competency of the proceeding in this case.

Mr Clerk.—If the objection stated by Mr Cranstoun has any solidity in it, I am sure no good answer has been given to it on the other side of the Bar, and indeed no answer at all. The learned gentlemen were pleased to talk of a practice since 1812, of which they have shown your Lordships no record; and one of them talks of a case brought into Court a number of years ago, in which, he says, a first indictment was abandoned, and a second served on the pannel, upon which second indictment the trial proceeded. As to the circumstances of that case, we have the authority of my learned friend, which is, no doubt, considerable; but it is not an authority upon which, in duty to my client, I am bound to rely. And to what do these cases amount after all? Just to this, that the pannel allowed himself to be tried upon a second indictment without making any objection to it. It is very easy to account for all these cases. It very frequently happens, that it would not avail a pannel to have his trial put off—he is prepared to meet it, and his Counsel being ready, he would not wish to put off the trial, or incur any further delay.

We, who are Counsel in this case, consulted together whether it was worth while to state this objection, as it would merely lead to delay. During one period of the consultation, I was of opinion, that it was not worth while to state the objection, being all the while satisfied it was a good objection. What I have said is sufficient to account for all the cases which have been cited, even supposing they were stated accurately. In general, I may observe this, that it often happens in cases coming before this Court, that the gentlemen who attend for the pannel are better acquainted with civil, than with criminal trials. Such an objection as we now maintain would very possibly not have occurred to *me*. But it stands on the ground of authority and of principle, and it must be considered well founded. Upon what is it founded? *First*, It is positively laid down by Mr Hume, who mentions his

authorities, and he himself is a great authority, that the prosecutor, public or private, cannot abandon his indictment after the relevancy is pleaded to. He has no right to give it up. He has no more right than any other litigant has to give up any case without the leave of the Court. I apprehend you cannot reasonably have any doubt as to this point, that no prosecutor can of his own authority desert the diet, or abandon the libel, or prevent the Court from discussing that libel. The matter must be judged of by the Court. This is expressly laid down by Mr Hume, and I am surprised my learned friend should use his own authority against Mr Hume's authority, without offering any argument upon the subject. "It is also a case which sometimes happens," says Mr Hume, (Trial for Crimes, vol. ii. p. 28.) "that though still resolved on bringing the pannel to justice, the prosecutor sees cause, however, not to insist on the trial of him on that particular libel. Because, perhaps, he has discovered some flaw in it or the executions thereof, or on account of new and material evidence which has lately come to his knowledge, and which requires an addition to his list of witnesses, or may occasion a difference in the laying of his charge. In situations of this sort, which, notwithstanding all due pains on the prosecutor's part, must sometimes happen, it is necessary to the advancement of justice that he have the power of deserting his present libel, without prejudice to his right of insisting anew at the time, and in the form which he shall find advisable. If, indeed, he had the absolute and uncontrolled privilege of throwing up his process as often, and for what causes soever he pleased, this would be dangerous to the pannel, who might thus, under false or affected pretences, be harassed with repeated libels. Our custom does not, therefore, trust the prosecutor to that extent, but allows him only to move the Court to desert the diet *pro loco et tempore*; in which request they may refuse to gratify him, if they see cause to believe that he intends any thing oppressive or improper, or if they are not satisfied that there are good reasons for such an indulgence. It is true the style has crept into practice, of the prosecutor deserting the diet, because it so often happens that his motion for such a purpose is successful. But in truth this is a loose and inaccurate expression: for the act of desertion is not his act, but that of the Court, without whose permission and deliverance the process cannot be withdrawn in this temporary form." There is a great deal more to the same effect.

Lord Gillies.—Mr Drummond says this is not a desertion of the diet, but an abandonment of the indictment.

Mr Clerk.—It is clear that the whole of this passage applies to the case now before the Court. I shall put this case to your Lordships. Suppose that a libel is served on a pannel with a list of witnesses annexed, that the pannel objects to the relevancy, that the Court takes the libel into consideration, and that, in the course of the argument, the prosecutor discovers he could strengthen his case by throwing up that libel. Suppose that he therefore brings a new libel with a *new* list of witnesses: May not the pannel reasonably object, I have disclosed my witnesses in pleading to the former libel, and therefore it is improper the prosecutor should have power to throw up the former and bring a new libel accusing me for the same crime?

What Mr Hume says is, that the Court may allow the prosecutor to throw up, or desert his libel, but that he cannot do so without leave of the Court. Were the prosecutor to be allowed of himself to desert his indictment and bring a new one, he might make such an attack on the prisoner, as the prisoner might find difficulty to parry. That would be a hardship on the prisoner, and one produced partly by the discussion on the first indictment. And if the first indictment were to be discussed, and the pannel to be tried on it, the case might be such, or the very evidence such, as to entitle him to an absolvitor. That is an important consideration. The authorities are clear with me. The prosecutor of himself has no right to throw up his libel after it has been pleaded to. "The act of desertion is not his act, but that of the Court, without whose permission and deliverance the process cannot be withdrawn in this temporary form."

A private prosecutor must give caution to insist in his libel. "Indeed if he be a private prosecutor, the Court have already caution from him to insist on that libel, and to this they may hold him and refuse to give new letters if they see cause. Accordingly, in the debate in the case of Archibald, the prosecutor frankly disowns all pretensions to any such arbitrary power. His Majesty's Solicitor represents, "that he observes, in the information on the part of the pannel, very alarming consequences are endeavoured to be grafted on the doctrine pled in behalf of the prosecutor in this case, as if it gave to the public prosecutor a very arbitrary power of oppressing the subjects in this country, by deserting diets as often as his fancy suggested. But as all the alarming consequences pointed out are founded

upon the supposition of a doctrine which he never meant to plead, he thinks it now proper to have this matter clearly understood, as the public prosecutor never pleaded, nor does he desire it to be believed by the subjects in this country, that he has any arbitrary power of deserting diets without the authority and intervention of the Court; which circumstance totally removes all those apprehensions which the Counsel for the pannel has grafted upon the supposition that an arbitrary power of deserting diets was claimed in this or in any other case by the public prosecutor."

Really, my Lord, after reading that passage, and the whole of the passages in Mr Hume, I submit that it is quite idle to maintain that the public prosecutor has it in his power in all cases to desert his libel, and throw up his process. He may do so before the pannel has pleaded; but the moment the pannel has joined issue with him, then the pleasure of the Court must be taken as to a new trial.

The assertion is manifestly groundless, that the public prosecutor may abandon an indictment after it has been pleaded to, and bring a new indictment. Before such pleading he may execute a new indictment, which is understood as an abandonment of the old. But it is contrary to principle and authority to suppose, that, after a pannel has pleaded, the prosecutor may throw up his libel, and have recourse to a new indictment. He may be compelled to discuss the libel to which the pannel has pleaded. If it be thrown out upon the relevancy, the prosecutor may bring forward a new indictment. But suppose that it is not thrown out upon the relevancy, that the case comes to trial, and that the pannel obtains an *absolvitor* upon that trial, the prosecutor cannot bring a new trial for the offence there charged. Therefore, I say that the public prosecutor has no right, without the authority of the Court, to abandon this indictment; and although he has taken upon himself to execute a new indictment, he cannot abandon the old indictment without the authority of the Court. If this proposition is true, the public prosecutor must do something more, or you must do something more for him, before he is entitled to proceed on the indictment before your Lordships.

As to the case of Colonel Charteris, we are told in answer, that for some time past it has been the practice for the public prosecutor to abandon a first indictment, without taking any notice of it to the Court at all, but merely by executing a new indictment. The pannel may no doubt be tried on this new indictment, if he is more afraid of the old than the new one. But whenever the point of objection is

stated, you must go back to the principles and judgments of your Lordships in parallel cases; and upon these it is clear, that till the public prosecutor gets the first indictment out of his way, which he has not yet done, he cannot proceed on the second.

If he should move to desert the diet *simpliciter* on the first libel, which he may do, the question will be, Whether he is entitled to go on *de plano* with the second? We have been only paving the way for this last question, which is the true subject for your consideration. The question comes to be, Whether the public prosecutor, upon now giving up the first libel, is entitled to proceed on the second? We submit that he is not. For it appears from the case of Charteris, that the Court would not allow the public prosecutor to have in dependence several libels at the same time. They forced him to abandon three of his libels altogether, and then Colonel Charteris went to trial on the fourth. Supposing it had been dismissed upon the relevancy, and that the public prosecutor had been allowed to depart from that libel by the Court, he might have brought a new indictment. But I ask this, upon which the whole point now depends; Would it have been competent for the public prosecutor, after having been forced by the Court to withdraw three of the libels, before the pannel was obliged to plead to the fourth one, to have on the same day executed these other three libels, and forced the pannel to go on and plead to them? This would have been considered so great an evasion of the justice done by the Court just before, that it would not have been endured. No public prosecutor could have set his face to that. Yet, where is the difference between that proceeding and the proceeding in the present instance? The first libel here is in dependence, and a new one has been executed upon the same grounds, though not in the same form. The prosecutor executes a new indictment before the old one has been disposed of. Is there any difference between this case and the case of Colonel Charteris, as it would have existed, if the public prosecutor, after abandoning three indictments, had proceeded in the manner which I have just supposed?

Your Lordships have been told, that there is no intention to do any injustice to my client. I do not say there is. I say they have gone wrong in point of form—in point of power—they have no right to proceed as they are doing. Though the public prosecutor now may not be disposed to do injustice, his successor may; and we might as well set afloat

the whole forms of the Court at once, upon saying that the public prosecutor intends no injustice.

It was said, that the Counsel for the pannel had notice that a new indictment was to be executed, and that the former indictment was to be abandoned. I am one of the pannel's Counsel, and I did not get notice of this. But what signifies the notice? It is binding on nobody—it is not binding on the prosecutor, or on the pannel. Such a thing could not be done without the Court. It was very well in my Lord Advocate to have such polite intentions toward the pannel; but it is not for his Lordship to determine this matter. It is the Court, which are to do or not do what he wishes, according to their opinion of the merits of the case.

This kind of specialty pleaded by the prosecutor signifies nothing. Down to the present hour, my client and his Counsel have been forced to the consideration of both indictments; and no little consideration has been given to both—and that is the hardship which it is the object of the law to prevent. Upon the whole, therefore, I hope that I am not obliged to answer this indictment before the first shall be disposed of—and then I am entitled to the benefit of full *inducia*, after the first libel shall be abandoned. I am not bound to answer to this indictment without any warning. If the prosecutor had no right to execute that indictment, it must be considered as not executed at all. Fifteen days, at all events, must be allowed after the first indictment shall be legally abandoned.

Mr JEFFREY.—There are only two points———

LORD ADVOCATE.—I object to more than two Counsel for the pannel in reply.

LORD HERMAND.—As many of the pannel's Counsel as please may speak.

LORD ADVOCATE.—As many of them as wished might have spoken before the Crown was called upon to answer, but they cannot now all be allowed to speak. It is also irregular for a junior Counsel to speak after a senior Counsel.

Mr JEFFREY.—What have you to do with that?

LORD HERMAND.—In justice to myself, I must here offer an explanation. One of the oldest cases I remember is the trial of Provost Montgomerie in 1759. Half a dozen Counsel there spoke *seriatim*. I have myself been in cases in which this was done, having spoken in the middle of four or five Counsel; but it was at the beginning, in answer to a plea to the relevancy, and not in reply.

LORD JUSTICE CLERK.—I am of opinion with Lord Hermand. Here the whole eight Counsel for the pannel might have spoken in succession immediately after Mr Cranstoun; but I know no instance of two replies having been admitted for a pannel.

My Lords, you have heard this argument maintained very ably,. and you will now say what are your opinions on the subject.

LORD HERMAND.—In every case I should be desirous of getting any information to enable me to sustain objections in favour of a prisoner. But my opinion is, that the objection in the present case must be repelled, because the prisoner has no interest to plead the objection.

At the same time, I am disposed to do all justice to the argument of Mr Cranstoun. He stated, that the pannel had pleaded not guilty to the former indictment—that Informations had been ordered upon objections which were stated to the relevancy—that a new indictment had been served while the former indictment had not been deserted —and that the former indictment cannot be deserted without the authority of the Court. He stated, that fifteen days farther of *inducia* might be of material advantage to the pannel; and he figured strong cases of hardship which the Court would have to check; for instance, there might be a series of indictments, upon some one of which the King's Advocate might take it into his head to transfer suddenly the trial to Inverness or Aberdeen. I hope no such thing will ever happen; but should it happen, the Court has power to redress the grievance.

In considering the objection which has been brought forward, I wish to know what interest the pannel has to plead it. I could figure a case where the pannel might have a strong interest to plead such an objection; and then I might think differently from what I do on the present occasion.

The case would have been altogether different, if a different crime had been charged in the second indictment from what was charged in the first, or if the crime had been dif-

ferently stated, or if something had been added by the public prosecutor. But here the indictments are the same. Something is left out in the second, which appeared to me objectionable in the first—the narrative, that the pannel having "at Glasgow," &c. "wickedly, maliciously, and traitorously conspired and agreed with other evil disposed persons, to break and disturb the public peace, to change, subvert, and overthrow the Government, and to excite, move, and raise insurrection and rebellion, and especially to hold and attend secret meetings, for the purpose of obtaining annual Parliaments and universal suffrage by unlawful means, did," &c. But, are the pannel's Counsel much the worse in their cogitations on the second trial, from this passage being struck out of the indictment? There is no increase in the second indictment; and, with the diminution which I have now mentioned, the two indictments are in the same terms. The pannel, therefore, has no interest to plead the objection upon which he appears to rely.

It is true that the prosecutor, in law, or in point of form, cannot, of himself, desert the diet. But did the Judges ever take it into their minds to ask the prosecutor, upon any occasion, why he desires the diet to be deserted? We presume he has good reasons for doing so, and we never ask him to state those reasons. The power of passing from or deserting an indictment, is substantially in the power of his Majesty's Advocate or of his Deputies.

I think the Counsel for the pannel would have done better to have withheld their objection. Has this pannel pleaded to the present indictment? I believe not; for his Counsel prevented him. The first indictment had not gone to a jury, and never will. Before an indictment go to a jury, it has been by practice in the power of the prosecutor at any time to pass from it by bringing a second indictment; and it were unwise to put a rash hand to any variation in the procedure in criminal trials. Many instances might be cited of a first indictment having been virtually passed from by a second serving, and many cases to that effect were cited by one of the learned gentlemen, without going farther back than 1812. These cases are familiar to us all. I was present at several of the trials. The Lord Advocate went farther back, and he stated the case of Mendham. I take the true view of the law to be this—that the serving of a new indictment is a substantial derelliction of a former indictment. An application to the Court on the subject is a mere piece of form. No good can arise

from sustaining the objection in this case; and I do not think that in law and practice it can be sustained.

Lord Gillies.—I am not sure that I can arrive at the same conclusion with my brother who has now spoken.

I think it fair to state in the outset, that actual hardship is a plea which cannot be stated in the present instance. I do not think that the pannel can complain of hardship; and no such plea, I believe, is seriously insisted on, as that of actual hardship. The argument of the prisoner's Counsel is an objection in point of form, founded upon principle, and all forms are of importance which regulate criminal procedure.

The case of Charteris was the first referred to; and what do I gather from that case? There were there four indictments; and the prisoner was brought to the Bar under the charge contained in all these four indictments, having pleaded at that time to none of them. His Counsel excepted to this, and I think with reason; and, in consequence of what passed, the prosecutor was obliged to abandon three of the indictments, and the trial proceeded upon the fourth. I understood Mr Clerk to say, that the trial did not proceed *instanter*; in which I think he is mistaken. I think that all that was done in that case was to find the prosecutor could not proceed on any one indictment without expressly abandoning the rest; and I understand the trial proceeded immediately. This judgment, whether right or wrong in the case of Charteris, and though much founded on, seems to have been departed from in the subsequent practice of the Court. It seems to have become an established practice, reconcileable with principle, that a public prosecutor may raise indictments against a prisoner in succession for any period, and may bring him, when he chooses, to trial, and that the prisoner has now no ground for objection as in the case of Charteris. I hold so, for this reason, that it is now an established principle, that in criminal prosecutions, a public prosecutor, by raising a fresh indictment against a prisoner, *eo ipso* passes from all former indictments. Suppose, therefore, that the unfortunate man at the Bar had not pleaded to the old indictment, I should have considered the new indictment a virtual abandonment of the former one. I conceive that the practice which has followed the case of Charteris, is reconcileable to principle, and for this reason, that till a prisoner pleads to an indictment, the public prosecutor has the disposal of the indictments,

and he may bring it or not before the Court—he may abandon it virtually, or expressly, without the consent of the Court.

That is what the practice goes to. But what is the case here? The difference between this and Colonel Charteris' case is, that here the prisoner did plead to the indictment. And what was the consequence of his doing so?—that the indictment was no longer within the power of the public prosecutor—he no longer could desert the diet—that is all within the exclusive power of the Court. If I am asked whether, when litiscontestation has taken place, and the pleading of the prisoner to the indictment may fairly be considered as an act of litiscontestation, the public prosecutor is entitled, of his own authority, to desert the diet or abandon the charge? I answer in the negative. He cannot do it without the interposition of the authority of this Court.

That question is decisive to a certain degree on the present point. If he cannot abandon it expressly, he cannot do it virtually—he cannot do it by implication—he cannot do it without the authority of the Court. It is laid down by Mr Hume, and I conceive it to be a most important principle in our proceedings, that after a pannel has pleaded to an indictment, the authority of the Court must be had for the abandonment of that indictment. I do not talk of this as a case of hardship; but I conceive hardships might arise from the exercise of such a right, by a public prosecutor, as his Majesty's Advocate now contends for.

The public prosecutor has many privileges. Many are justly, and reasonably, and wisely, and for the most proper purposes, given to him, which are not allowed to a private prosecutor. But litiscontestation goes through all cases. After it, neither party can go out of Court without the authority of the Court. Hume illustrates the rights, the situation, and predicament of the public prosecutor, by referring to the situation of the private prosecutor in similar cases. I can easily conceive cases to exist, though I have no apprehensions of their existing, in which it might be the duty of your Lordships, in point of justice and law, and on important considerations of every description, to say that you would not allow the public prosecutor to abandon an indictment and take up a new one.

I apply this principle to the present case. The pannel has pleaded not guilty to the first indictment, and a new one has been raised. I do not say the new one is null—I am not prepared to go that length. But this much I say, that this does not extinguish the old one—that it is not a virtual discharge of it, because the public prosecutor can-

not expressly discharge or desert the first of himself. I conceive that the first still subsists—it has not been discharged by any authority competent to discharge it. It still subsists; and here the prisoner has a fresh indictment served against him. What is to be done with the present indictment? It is not null—but what the prisoner says is, I must have full *induciæ* granted me; and the whole question is, whether the full *induciæ* shall be granted him, Yes or No?

I think that, in point of form, you are bound to dispose of the first indictment, and then the question is, whether you will allow the pannel the fifteen days, Yes or No?

It was said that the prisoner has no interest to plead the objection. I cannot go into that. This is a question of life and death, and he is the best judge of his own interest. I am not entitled to tell him that he has no interest not to be tried to-day. For any thing I know, he has a great interest—a material interest, by which his life may be preserved or prolonged. To have his life prolonged even for fifteen or sixteen days, is perhaps a serious object to him, as affording him possibly a better chance to save it from the present danger.

If the practice founded on by the Crown Counsel were of long standing, inveterate, and reconcileable to principle, I should hold it sufficient to authorize the proceeding which is objected to in this case. But as to the practice cited here, where an indictment has been pleaded to by the prisoner, I have seen no cases stated prior to 1812. The case of Somerville in 1813, and that of Horn in 1814, were mentioned. The case of Mendham I have no distinct recollection of. I take it for granted it was correctly stated. These three cases are all we have been told of, which truly apply to the present case. I cannot pay such regard to these cases, as to be of opinion that they entitle me to overrule the objection; *First*, Because they are too recent in date, and too few in number, for regulating our decision: *Secondly*, I think they ought not to be attended to, for this reason, because I do not see that the objection was stated; and we all know how apt the best men are to fall into errors and slight irregularities when not put on their guard by the Bar. We were told, that it is the duty of the Court to watch over the proceedings, and see that they are regular and consonant to established forms, whether any thing be stated from the Bar or not. In that observation I agree; and I am sure that I speak the sentiments of the Court when I say, that we are sensible of the anxious and able care displayed by your Lordship on all occasions of that

kind. But it is impossible for any man to attend to every thing. I say, therefore, I pay much the less regard to these cases, because they were not argued by the Bar. They are cases in which the objection was not urged. If the objection had been stated, the Court would have given greater consideration to the point. I have a third reason, viz. that I cannot reconcile these decisions to strict principle. I think, that after a pannel has pleaded to an indictment, the public prosecutor cannot pass from that indictment without the authority of the Court; and that he cannot virtually abandon a first indictment after such pleading, merely by serving a second indictment upon the prisoner.

I therefore think this objection is well founded, to the effect that it is our duty to insist that the Lord Advocate shall proceed on the former indictment, or shall now move the Court to desert it. Whether any consequences may follow from delay, I am not aware. The pannel asks fifteen days longer; and, if he is right in point of form, I cannot refuse his demand, on the ground that he has no interest in what he asks.

Lord Pitmilly.—This is a point attended with some difficulty; and it would be singular indeed, if, after attending to the learned pleadings at the Bar, and what we have heard from the Bench, I could say I felt it unattended with difficulty. My impression however is, that the objection is not well founded. In questions of this description, the practice is the safest guide to go by. It here appears strong. I do not speak particularly of the case of Mendham; but the cases of Somerville and Horn are distinctly in point—are identical to the point before us.

It is true these are late cases, and that no others have been mentioned. But let it be remembered, that this objection comes upon us unprepared. Neither your Lordships nor Counsel have had time to look to precedents; and I think it would be right to have a search made into former cases, to see whether these are the only cases which are the same with the present.

It is certainly true that these cases were not argued before your Lordships; but the Court is bound to attend, and always does attend to the relevancy of proceedings of this kind, and particularly when it is important to the defence of a pannel at the Bar. The Court will in all such cases attend to the regularity of procedure; and in the case of Somerville this point was stated to the Court—it was not argued, but it was not overlooked.

I do not see that any hardship could arise from holding that the serving of a new indictment is a virtual abandonment of the old. It was upon that principle that the case of Somerville was decided; and if I did not understand that to be the principle in the case of Somerville, I should be of a different opinion as to the present case. I see no hardship to the pannel, nor any want of principle in the rule. It is upon these grounds, though with difficulty and hesitation, that I think the objection cannot be sustained. At the same time, it may appear to be of importance, and I have no objection to have the point more fully considered, and a search made for precedents, because I am satisfied that when the matter is investigated, it will be found that the Court has proceeded upon these grounds in other cases.

Lord Reston.—The first inquiry is, Whether this question has been settled or not by prior practice? If it is not so settled, I agree in the opinion which Lord Gillies expressed.

If I understand the quotations that were read from Mr Hume, it is not in the power of the public prosecutor, without the authority of the Court, to pass from an indictment to which a pannel has pleaded; and the pannel may insist that the case should now go on upon the first indictment. The pannel should not be exposed to the hardship of not knowing upon which indictment his trial is to proceed. It is in the power of the Court to pass from the first indictment or not, upon the motion of the Lord Advocate; and the pannel should not be uncertain, upon coming into Court, upon which of the two indictments he is to be tried. It would be a hardship to put him in that situation.

It was said that the indictments are the same, or the one only a part of the other. That certainly does appear to be the case; but when they come to be minutely sifted, there may be other circumstances discovered, of which the pannel may avail himself.

I think he ought to have fifteen days *induciæ* on the second indictment, after the authority of the Court is given to the abandonment of the first indictment.

As to the practice which has been cited, Lord Gillies stated very good reasons why we should not be bound by it. It is only of four years standing, and the objection was not stated in any of the cases which were cited. The practice cannot therefore be binding on the Court. I am for sustaining the objection, or allowing a search for precedents. The practice is perhaps of longer standing.

Lord Justice Clerk.—I certainly have no difficulty in stating to your Lordships, that, notwithstanding the very able manner in which this argument has been urged on the part of the prisoner, and notwithstanding my deference for the opinions of my brothers on my left hand, I am not prepared to concur in the objection which has been brought forward in this case; and if driven to the necessity of giving a decided opinion at present, I must differ from these learned Lords, and find that the objection ought not to be sustained. Notwithstanding the weight of these opinions, you have the practice established in point of fact—for, from the deliberate averment of the Counsel for the Crown, you must assume that there is a series of cases in which you have acted on a principle directly opposite to that which is now contended for by the Counsel for the prisoner. I apprehend that it is also a weighty consideration in this question, that in one of the cases which has been cited, as to the procedure in cases like the present, the prisoner was visited by most exemplary punishment. I allude particularly to the case of Lindsay Crauford, who was sentenced to transportation for fourteen years. Somerville too was unfortunate indeed, if there was a valid objection which might have been stated against his trial, as the sentence upon him was imprisonment, accompanied with an exhibition on the pillory. These are precedents which have not been hitherto doubted by the Court; and yet our attention is now called to this question, and we are desired to sustain the objection of the pannel's Counsel. I do hold it to be my sacred duty, sitting here as a Judge in a question as to a form of procedure, before I put my rash hand to alter what has been the practice, to be convinced by argument, reason, and authority, beyond doubt, that that practice, so uniformly adopted and followed by such consequences, is contrary to law. If I did not so act, I should consider myself as in fact accessory to a fundamental subversion of our criminal procedure.

But although my opinion is different from that of my learned brothers, I am disposed to go into the proposition made by Lord Pitmilly, of inquiring into the fact, Whether or not these recent cases are bottomed upon an older practice; which, if established, would go greatly to do away, or would much diminish the impression of the opposite opinions which have been delivered.

I do think it no more than justice to the Lord Advocate to say of the statement of his Lordship, that he had no other view than to bring before the Court the practice prior to that stated by Mr Drummond. The case of Mendham

occurred in 1804, not so recent as the practice alluded to in 1812. Mr Burnet, where speaking of forgery, page 190, says, "The question again occurred in the trial of the same person (Mendham) in October 1804, for uttering and vending forged notes. The Court ordered informations on the point, but the prosecutor afterwards *passed from* the charge, and brought Mendham to trial on a different indictment in December following, for forging and uttering Bank of England notes, with an intent to defraud the Bank of England." Your Lordships see, that Mr Burnet, who was familiar with the forms of the Court, and was industrious to make himself acquainted with every thing relating to the criminal law and procedure, states, in the very language which is objected to in this case, that the prosecutor afterwards passed from the charge. This is just another case to be added to that other train of precedents which have been cited.

This then being the case; there being evidence before you of a practice since 1804, and in one of the cases, the attention of the Court having been particularly directed to the point in question, a circumstance which I now positively remember, the question is, Whether the pannel is now entitled to state to your Lordships, that there is such a formidable objection to this practice, in point of principle, that you ought to lay it aside, and establish a new practice in this Court. That is the extent of the argument pressed upon you. Cases formerly were not so fully reported as they now are; but you are bound to hold, that in those in which the practice now objected to was followed, it had the consideration of the Court. If the practice had appeared to the Judges to be objectionable, they would have interfered, though no objections were stated by the pannel's Counsel.

I cannot agree with my learned brothers as to the possibility of hardship arising to a party from the practice which has been followed in this case. I do not think that the public prosecutor, in virtually passing from a first indictment by serving a second, leaves the pannel *in dubio* upon which indictment he is to be tried. If it could be made out to my satisfaction that such was the case, I should indeed see something like hardship. But the moment it is held to be clear law, that even after the debate on the relevancy of an indictment, and after Informations ordered on the subject of the objections stated, the public prosecutor, by serving a second indictment, passes from the first, there is no injury can possibly arise to a pannel; he cannot be ignorant upon which of the indictments he is to be tried.

The Counsel must know the law; and when consulted by him, they can inform him, that though five indictments have been served against him, it is only the last to which he has occasion to direct his attention. It is the duty of Counsel for an accused, in reference to what I hold to be the clear rule of practice, to give the pannel this information, and then no pannel can be held in doubt as to the indictment upon which his trial is to proceed. It is upon a settled conviction that no prejudice can arise to a pannel in such a situation that I think the objection is not well-founded.

Indictments, where there has been no pleading, are every day passed from, with or without any reason appearing on the face of the indictment. I say, the same principle applies to a case like the present. The cases are the same as to the safety of the prisoner. There cannot a shadow of doubt remain in his mind as to the indictment upon which his trial is to proceed; the rule of practice is a sufficient guide for him.

Upon these grounds, I say, I should be for repelling the objection; but I concur in the proposition which has been made to your Lordships, that in a point of practice, which is of infinite consequence to the accused—the law of the country—and the guidance of futurity—and where it is stated that a recent practice only had crept in which was unknown in former cases, an inquiry should be made to ascertain clearly how the matter stands.

A small indulgence in point of time may be granted. The parties may be allowed to give in short Minutes of the state of the practice, to be delivered on or before Saturday next; and the case may be resumed this day se'ennight.

Lord Advocate.—There is another trial, that of Douglas, fixed for Monday. I never have felt any desire to press a prisoner in point of time, if any object whatever was stated to me for his wishing delay. If the pannel's Counsel wish for time, I can have no objection to grant it them. On the present occasion, I only think it necessary that I should be permitted to state upon your Lordships' record, what I now state *viva voce*, that I did understand that by the service of the second indictment there was a virtual abandonment of the first.

I have no objection to this point being settled, even previous to Monday. The Minutes should be ordered to be given in immediately, that there may be no delay in bring-

ing on the trial afterwards, as we may be told, perhaps, that no *inducia* had been running upon a second indictment. I do not wish to press the business; but a short day should be assigned for the inquiry proposed, which may be completed without delay.

Mr Clerk.—It is impossible to search a record which has no index, in two days.

Lord Gillies.—There may be a debate upon the relevancy; and, by possibility, what the Lord Advocate says may take place.

Lord Advocate.—I passed from the first indictment by executing the second, and the *inducia* on the second began to run from that time. I owe too much to the law and the decisions of your Lordships, not to oppose the objection which has been brought forward to-day.

Lord Justice Clerk.—There is to be no argument in the Minutes. They are to be seen and interchanged.

Lord Advocate.—With regard to the terms of your interlocutor, a diet cannot be continued as to an indictment which has been passed from. I passed from the first indictment, and a majority of the Court agree that the first does not now subsist.

Lord Gillies.—The authority of the Court must be obtained to the passing from that indictment.

Lord Justice Clerk.—We keep every thing entire.

Lord Advocate.—The question for your consideration has not arisen under the first, but under the second indictment. Your Lordships called the second indictment; you called the pannel to plead to it; and in bar of his doing so, a motion was made that the trial should not take place upon that indictment; and the question is, whether the trial can proceed on it or not? Therefore you cannot proceed on any other, or continue any other than the second indictment. A majority of your Lordships are of opinion that the first indictment was virtually passed from, and I called the diet of no other indictment than the second.

The following Minutes of the debate were then entered upon the record.

CRANSTOUN, for the pannel, *objected*,—That it was incompetent to serve one libel against a pannel, while another, upon which he had already joined issue by pleading, was still current against him: That the first libel, having been pleaded to in face of the Court, was no longer *sub potestate* of the Public Prosecutor, and could not be deserted, or otherwise disposed of, but by judgment of the Court: That this libel, being still in force against the pannel, was the only one against which he could now be called to defend himself; and that it was not till after it had been disposed of by sentence of their Lordships, that there was room for the service of a second, against which the pannel was entitled to have the full *induciæ* of fifteen days, to prepare for his defence.

HOME DRUMMOND, for his Majesty's Advocate, *answered*,—That the proceeding upon this occasion is sanctioned by the established practice of the Court; and that the very same course has been invariably followed in every case where the same circumstances have occurred. So, for example, in the case of Lindsay Crauford, indicted to stand trial on the 9th January 1812, when the diet being continued till 3d February, new criminal letters were in the meantime raised, the diet whereof fell on the same day, and the trial proceeded. Thomas Sommerville was indicted to stand trial on the 25th January 1813. He pleaded not guilty; and after a debate on the relevancy of the libel, informations were ordered to be lodged on the 15th February; but new criminal letters were raised, the diet whereof fell on the same day, and the trial proceeded. A question was asked in this case by one of the Judges, if it would not be proper to desert the diet of the first libel? but it was *answered*, that a desertion might be argued to affect the second also; and that the former was held to be abandoned by the service of a new one. The Court said they would adhere to the practice; and the case proceeded. In the cases of John Hope, June 13th and July 6th 1814, and of John Bell, who pleaded guilty on the first calling of the diet, January 9th and February 3d and 10th, 1817, similar proceedings took place; as also in the previous case of Mendham in 1804.

2*do*, His Majesty's Advocate possesses an uncontrolled power over his *instance* in all stages of a criminal process. He is not bound, as a private prosecutor is, by statute, to

insist at the appointed diet, but may at all times abandon or pass from any indictment he has raised, or any part thereof; and he does so in daily practice, according to his pleasure. And if he exercise this power at any time before an assize is set to try the case, he is still at liberty to insist of new against the pannel in another indictment for the same offence.

3*tio*, The remedy for the possible abuses that may follow from this power, is to be found, not in attempting to compel the Prosecutor to maintain an instance which he has dropped, over which the Court have no controul, and for which the pannel has no interest to insist, as he is out of Court by the abandonment of the charge, but in opposing its oppressive renewal or continuation, when the Court may, on sufficient cause being shewn, desert the diet *simpliciter*.

4*to*, No objection is or can be made to the numberless examples of an instance dropped where the pannel has never pleaded to the charge. Now this case is in nowise different in principle; for the parties can in no sense be said to have "joined issue" before an assize is set; no plea or statement of facts being final that is entered before the judges of the fact are named; nor can a pannel have a *jus quæsitum* in his own plea. The doctrine of *joining issue*, or *litiscontestation*, has no existence in this Court, being founded in a presumed judicial contract between the parties; a thing inconsistent with the first principles of criminal law.

Lastly.—*Service* of a second libel has, in the recent practice of the Court, been held to imply the virtual abandonment of the first; and, consequently, there is no ground for the complaint of two indictments subsisting at once against the pannel, and of his uncertainty to which he may be called upon to answer. Accordingly, his Majesty's Advocate declares, that he has abandoned the first libel; and he has no objection to authenticate this statement on the record in any form the Court may think fit; and this he apprehends is all the pannel has any right to require.

As to the *inducia* of fifteen days, there is nothing in the Act of Parliament to prevent the service of a second libel during the existence of a former one; and it is contrary to no principle, and sanctioned by the inveterate practice of the Court.

THE LORD JUSTICE CLERK and LORDS COMMISSIONERS of JUSTICIARY having considered the foregoing objection,

with the answer thereto, and heard parties' procurators thereupon at great length, before answer, ordain parties' procurators to prepare and give in minutes, stating the practice relative to the said objection; to see and interchange these minutes; and to print and lodge the same in the hands of the Clerk of Court between and Saturday next, in order to be recorded. Continue the diet against the pannel, and whole other diets of Court, till Monday next, at ten o'clock forenoon, in this place: And ordain parties, witnesses, assizers, and all concerned, then to attend, each under the pains of law; and the pannel in the meantime to be carried back to the Castle of Edinburgh.

(Signed) "D. Boyle, *J. P. D.*"

MINUTES of Search of the Books of Adjournal, *From 1st January* 1777.

Alexander Penrose Cuming, Esquire, against John Lawson. *Perjury.* 1785.

The diet was deserted *pro loco et tempore* on 1st February 1785, the pannel not having pleaded. After the interlocutor deserting the diet, "Mr Erskine then represented, that new criminal letters had been raised and executed, at the instance of Mr Cuming of Altyre, against the said John Lawson, the diet whereof stood continued to this day." The Court continued the diet upon these last criminal letters to the 14th of February; on which day the pannel pleaded not guilty, and informations were ordered. He was afterwards tried, and found not guilty.

John Burns and Alexander Baillie Veitch. *Assault.* 1789.

The diet was called on 21st December 1789, when Veitch was outlawed; and the diet continued against Burns to 18th January 1790, before he had pleaded to the charge. In the mean time, Veitch applied to the Court to be reponed against the sentence of fugitation.

On 26th December 1789, Burns and Veitch were served with a new indictment for trial on the said 18th January. Upon that day the Court adjourned to the 25th; from which it was adjourned to the 26th, and from the 26th to

to the 1st February. The trial proceeded on 1st February, when the pannels were tried and convicted.

BERRY, ROBERTSON, and CALLANDER. *Sedition.* 1793.

Upon 28th January, diet was called; Callender was outlawed; and the diet was continued against the other prisoners (who had not pleaded to the indictment), till 11th February, when the instance was allowed to fall.

On 18th February they were tried, and convicted on an indictment which had been served previous to the said 11th of February.

ALEXANDER SCOTT. *Sedition.* 1794.

Upon 20th January the diet was called and deserted *pro loco et tempore*; but, upon the 18th, a new indictment had been served against the prisoner, charging him to compear upon 3d February.

On 3d February the diet of the second indictment was called, and Scott was fugitated.

RICHARD MENDHAM. *Forgery.* 1804.

Richard Mendham was cited to compear on 10th October 1804, when he pleaded not guilty.

Informations ordered to be given in on or before 30th October; diet continued to 1st November; further continuation to 13th November, when whole diets of Court continued to 14th; on which day, instance against Mendham dropt.

New indictment served on 3d November, charging him to appear the 19th November. On that day, a continuation to 26th November; then continued to 29th, and from that to 3d December; long pleading on the relevancy; and, after debate, his Majesty's Advocate passed from the libel, so far as laid on the common law; and diet continued till next day.

4th December, continued till 7th December; continued till next day. 8th, Further continued till 10th; on which day, interlocutor on relevancy; not relevant; dismissed from the Bar.

ALEXANDER CAMPBELL. *Theft and Robbery.* 1809.

After pleading not guilty, the Lord Advocate represented, that, for the present, he passed from the third charge in the

dictment, without prejudice to the pursuer to insist upon the new indictment, as accords.

(Signed) AD. COCKBURN, J. P. D.

This after informations given in and recorded, and several adjournments of the diets.

ANDREW FERNIE, and Others. Indicted for *Sedition*. Debate; and Informations ordered. May 24. 1720.

July 28.—Mr Walter Stewart, his Majesty's Solicitor and Advocate-depute, for his Highness' interest, judicially consents to the deserting of the diet against the within named and designed Andrew Fernie, &c. without prejudice to his Majesty's Advocate of insisting against such against whom new libels are raised, as accords.

The Lord Justice Clerk and Commissioners of Justiciary, in respect of the above consent, desert the diet against the said Andrew Fernie and others, above named, without prejudice to his Majesty's Advocate of insisting against such of them against whom new libels are raised, as accords.

(Signed) AD. COCKBURN, J. P. D.

The second libel being called,

Intran Andrew Fernie, &c. Indicted and accused, &c. Debate; and informations ordered. The informations afterwards given in, found relevant, and trial proceeds.

JAMES INGLIS, Indweller in Leith. Indicted and Accused as guilty of *Theft, Robbery, and Prison-breaking*, &c. August 24. 1720.

Diet continued till 26th September, and afterwards to 17th October. On which day,

Intran James Inglis. Indicted and accused, *ut in die precedenti*.

Mr Robert Dundas, his Majesty's Advocate, for his Highness' interest, judicially consents to the deserting of the diet of the within indictment against James Inglis, pannel, without prejudice of insisting in the new indictment, as accords. (Signed) RO. DUNDAS.

The Lords Commissioners of Justiciary, in respect of the above consent, desert the diet upon this libel against the

said James Inglis, without prejudice of insisting on the new libel, as accords.

Intran James Inglis, pannel.

Indicted and accused on the new indictment. Informations ordered.

MONCRIEFF stated, That in compliance with the order of the Court, a search had been made in the Books of Adjournal for precedents applicable to the question now before the Court. That a search from the year 1777 downwards, had first been made, and the result had been communicated to the pannel's Counsel some days ago; but that after this a farther search had, it seems, been made, which appears to go back to the beginning of the last century; and the statement of the cases so found was only communicated late on this day. (May 23d.)

That on the part of the pannel it may now be assumed, that the Court has before it *every one* example which his Majesty's Advocate has been able to discover, in the course of *more than a century*, of any proceeding which he thinks calculated to support the measure which has been adopted in this case, or to meet the objection founded on the clearest principles of law.

That on the result of this search the following remarks are humbly submitted:—

1*st*, That there is *not one* example in the whole practice of the Court, in which the same objection which is here insisted on was stated to the Court, and *repelled* by a judgment.

2*d*, That the Lord Advocate has printed the statement with regard to those cases on which it is presumed he means to rely; and that, as far as the pannel's Counsel can discover, the only cases in the long period which have the smallest tendency to shew any practice in favour of the prosecutor, or which even *require notice* as having such a tendency, are *two* cases in 1714 and 1720, *one* case in 1804, *two* in 1813, and *one* in 1817. Between the year 1720, and the year 1804, the prosecutor has not been able to find *one* single case in the record, in which, after a pannel had pleaded to an indictment, a libel was served and sustained without a *previous* desertion of the diet on the first indictment.

3*d*, That to shew this, he should shortly take notice of each of the cases printed by his Majesty's Advocate.

On the first search, the following statement is submitted:—

John Lawson, 1785.—In this case the pannel had *not pleaded.*

Burns and Veitch, 1789.—Pannels had *not pleaded.*

Berry, Robertson, and Callander, 1793.—Pannels had *not pleaded.*

Alexander Scott, 1794.—Pannel had *not pleaded.*

Richard Mendham, 1804.—In this case the pannel had pleaded not guilty. Informations were ordered; and several continuations of the diet took place, the last to the 14th November. On that day, it is said, the instance was dropped: And in the mean time a new indictment had been raised on the 3d November. This, therefore, is *one* case, in which, after a party had pleaded, a new indictment was served before the diet on the other had been deserted by the authority of the Court, and without any such desertion. But the Court will be pleased to observe, that in that case the pannel clearly had no interest to make the objection, but quite the reverse. For the second indictment was equally irrelevant with the first; and accordingly the Court, after full debate, ordered informations; and after various adjournments, the libel was *found not relevant*, and the pannel was *dismissed from the bar*. Most clearly, therefore, it was not his interest to make any objection to the service of the second indictment.

Alexander Campbell, 1809.—This is not a case applicable to the point at all. There was no question about any new indictment; and the circumstance of the public prosecutor passing from particular charges in an indictment, intending or reserving the power afterwards to raise a new indictment, is wholly immaterial to the question. But at any rate, it is humbly apprehended, that even this takes place only with the consent of the Court, which is expressed by the terms of the interlocutor of relevancy.

Lindsay Crauford and Bradley, 1812.—This is one of the cases which was quoted in the debate. But the pannels had *not pleaded*, and therefore it is altogether inapplicable.

Napier and Grotto, 1812.—This case is of the same nature with that of Alexander Campbell. There was no second indictment, and no question about a second indictment.

Thomas Somerville, 1813.—This case is so far applicable, that the pannel had pleaded to the first indictment; that the

second indictment was served without any previous desertion of the first; and that the pannel was tried and convicted. But even with regard to this case, it is to be observed, that the crime of which the pannel was accused was that of perjury, the punishment of which could not exceed imprisonment and pillory; and that the pannel was at a very serious expense in defending himself at every diet of the Court. It was therefore obviously better for him that the trial should go on, whatever might be the event, than that it should be merely put off for fifteen days. Accordingly, the objection was not stated by his Counsel, and could not be judged of by the Court.

John Horn, 1813.—This person was indicted for uttering and selling forged notes; the first of which is a capital offence. He pleaded not guilty, and informations were ordered. Then a new indictment was served without any desertion; and a pleading on the relevancy again took place. But the Court will observe what followed. When the new indictment was found relevant, "Pannel *pleaded guilty*" to the second charge, and was sentenced to *transportation*. In such a case, though the pannel had an interest to object to the relevancy of the charge itself in both indictments, it is evident that it would have been very much against his interest to object to the powers exercised by his Majesty's Advocate, or to the regularity of his proceedings.

Bell and Douglas, 1817.—Nothing can be drawn from this case. Bell *pleaded guilty to both indictments*; and as to Douglas, the diet was deserted. It is submitted, that it has no analogy to the present question.

These are all the cases selected by his Majesty's Advocate, from the first note of search, from 1777 downwards. And it is obvious, that none of them have any analogy to the case, except those of *Mendham*, *Somerville*, *and Horn*; and, even as to these, the explanations appearing on the face of them are quite sufficient to *account* for *the objection not being stated*; which, after all, is the utmost that can be drawn out of them.

The additional notes mention *four* cases.

Isobel Nicolson, 1711.—Pannel in this case had *not pleaded*.

Patrick Hamilton, 1714.—The fact is not distinctly stated, nor does it at all appear what became of the case. Though the minute and interlocutor speak of the "new indictment raised," this may, in truth, refer merely to the notice of the Lord Advocate of an intention to raise a new indictment immediately thereafter. Without seeing the

dates, it is impossible to draw any correct inference. Besides, though it is mentioned in a note that informations had been given in, it does not follow that the pannel *had pleaded.* The informations might be on the form of citation, or on other points not necessarily implying that there had been a plea to the indictment.

In one view, however, this case is, with many others, a fatal precedent against the doctrine maintained by his Majesty's Advocate. For it will be observed, that *Mr Duncan Forbes* never thought of maintaining, that, after pleading, the service of a new indictment *ipso facto* put an end to the first, or that it could be abandoned otherwise than by an express interlocutor of the Court.

Andrew Fernie and others, 1720.—This case is nearly on a footing with the preceding. It does not appear when the new indictments were raised. But it does distinctly appear that his Majesty's Solicitor and Advocate-depute of that time did not imagine, that he had any power to abandon the first indictment otherwise than by a motion to the Court; and an express interlocutor was accordingly pronounced.

James Inglis, 1720.—Pannel had *not pleaded.*

This is an analysis of the *whole* cases founded on by his Majesty's Advocate. And the Court will now see, that there are none bearing even the appearance of analogy, except only, 1*st*, Hamilton in 1714; 2*d*, Fernie, &c. in 1720, the circumstances of both of which are imperfectly known; 3*d*, Mendham in 1804, in which both indictments were found irrelevant; 4*th*, Somerville in 1813; and, 5*th*, Horn in 1813, who at last pleaded guilty, and got the libel restricted to the charge which only subjected him to an arbitrary punishment.

That it would be for the Court to judge, whether there is any thing in these cases, picked out of the practice of *more than a century*, to overturn the established principle of law, which was explained in the debate, and is laid down by the first authority on the subject, that after a pannel has pleaded, the Lord Advocate has no power to abandon the indictment, except by express motion to the Court; and that if he cannot do it *expressly*, still less can he do it *virtually*, or by *implication.*

4*th*, That, annexed hereto, there is the whole search of the records from the 1st January 1777, downwards; and that from that list, the Court will perceive a much stronger practice, by which the Lord Advocate finds it necessary to move the Court expressly to desert the diet, intimating at

the same time, that he intends instantly to raise another indictment. And more particularly, there are many cases in which this is done after the pannel had pleaded.

Cumming against *Lesslie*, 1785.—Desertion after interlocutor of relevancy.

Walter Ross, 1786.—Had pleaded not guilty. Diet deserted *pro loco et tempore*.

Brown and *M'Nab*, 1793.—Desertion after interlocutor of relevancy, expressly for the purpose of serving a new libel.

Charles Sinclair, 1794.—Diet deserted after relevancy found.

Gavin Simpson, 1811.—Diet deserted after interlocutor of relevancy.

These are cases in which the pannel had pleaded. There are many others in which the record bears a desertion *pro loco et tempore*, for the purpose of *immediately serving a new libel.*

David Dalgleish, &c. 1780.
John Grant, 1783.
William Tenant, 1789.
Thomas Wilson, 1790.
Jacob Tait, 1795.
O'Neils, 1796.
Urquharts, 1797.
Kirby, 1799.
Richard Mendham, 1800.—"Diet deserted before pleading, *as the advocate stated he meant to serve a new libel this afternoon.*"
Clark and Brown, 1802.
Monro and M'Farlane, 1809.

That from this evidence of practice, to which may be added all the cases in the additional notes, it is humbly submitted, the inference is irresistible, that no such principle ever was recognized as that maintained by his Majesty's Advocate, that by executing a new indictment, a previous indictment to which the pannel had pleaded is *ipso facto* extinguished. The law has acknowledged no such power in the Lord Advocate, and it is as little sanctioned by any practice. On the contrary, the uniform practice, with the exception of a few straggling instances, all since the year 1804, and all but one since the year 1812, is directly the reverse, the Lord Advocate having always thought it necessary expressly to move the Court to desert the diet.

That on the whole, it was humbly submitted, that this search into the practice, instead of supporting the plea of his Majesty's Advocate, founded on a mere allegation of practice, in opposition to the principle of law, tends very strongly to support the plea of the pannel, and to shew the incompetency of the proceeding here objected to: That if there were nothing more to be stated, it would be enough, that between the year 1720 and the year 1804, there is *not one* example of a second indictment raised after a pannel had pleaded to the first, and before a desertion of the diet by authority of the Court. The case in 1804 has been explained; and it will be for the Court to judge, whether a practice, which really rests on *one*, or at the utmost *two* cases in 1813, can *make law*, in opposition to principles otherwise clearly established.

THE

TRIAL

OF

WILLIAM EDGAR,

FOR

ADMINISTERING UNLAWFUL OATHS,

26th May 1817.

PRESENT.

Right Hon. DAVID BOYLE, *Lord Justice Clerk.*

LORD HERMAND.	LORD PITMILLY.
LORD GILLIES.	LORD RESTON.

Counsel for the CROWN.

Right Hon. ALEXANDER MACONOCHIE of *Meadowbank*, *His Majesty's Advocate.*

JAMES WEDDERBURN, Esq. *Solicitor-General.*

HENRY HOME DRUMMOND, Esq. *Advocate-Depute.*

Counsel for the PANNEL.

JOHN CLERK, Esq.	J. P. GRANT, Esq.
GEO. CRANSTOUN, Esq.	J. A. MURRAY, Esq.
THOS. THOMSON, Esq.	JAMES MONCRIEFF, Esq.
FRANCIS JEFFREY, Esq.	HENRY COCKBURN, Esq.

WILLIAM EDGAR was placed at the Bar.

LORD JUSTICE CLERK.—Your Lordships remember the objection that was stated in this case. You ordered Minutes to be given in for the parties, stating the practice relative to the objection. These are now upon the table; and you are to say how they are to be disposed of.

(Here Mr Cranstoun was heard at considerable length in support of the objections to the competency of the indictment; but his speech is not reported for the reasons stated in the Preface.)

Lord Gillies.—Before the prosecutor begins, I want an explanation of a point. The case of Hamilton has been mentioned, in which Duncan Forbes was prosecutor. That name must excite in us all peculiar attention. On page 5. of the joint minute of the parties, it is stated by the public prosecutor, "Mr Duncan Forbes, his Majesty's Advocate, consents to the deserting of the diet against Patrick Hamilton, younger of Green, upon this libel," (I understand informations had been ordered, which raises a presumption that that libel had been pleaded to), "without prejudice to him to insist in the new indictment raised at the instance of his Majesty's Advocate against him." What I want to know is, Whether this new indictment raised was served? In looking at the preceding case, "but prejudice to him to insist in his other indictment already raised and executed," the insertion of "*executed*" in one case, and the omission of it in the other, excites suspicion that it was not executed in the other. It is mentioned in the one, and not in the other.

Mr Drummond.—My Lord Justice Clerk,—It appears to me, that there are two points for consideration in this case. The first is one of considerable importance, the other is of no importance at all as affecting the pannel. The first to which I allude, is, whether it be competent, during the dependence of one indictment to serve another. The consequence would be that, if this be incompetent, the service of the last indictment in the present case would be a nullity; and the pannel would thus obtain a further delay, to allow time for serving it over again. The other point is, whether, after an indictment has been *pleaded to*, (to use an expression which has been more dwelt upon in the present case than in all the former practice of the Court), it can be abandoned by the prosecutor, without an act of the Court, or whether it can only be got rid of with the authority of your Lordships. This second point is of no importance on this occasion, and is, in truth, a mere question of form; for, whatever your finding should be, the result will be the same to the pannel at the Bar.

The first point, however, fortunately appears to be attended with no difficulty; for it is settled by constant and inveterate practice. I shall not detain the Court by repeating what

is stated in the printed minutes, where your Lordships have before you not merely the five cases to which only the learned gentleman has thought proper to allude, but a series of other cases of which nothing has been said. There are, besides, the cases from 1711 to 1720, in the additional part of the minutes, which are completely in point upon this part of the subject, proving that any given number of indictments may subsist against a pannel at one and the same time. Even the case of Colonel Charteris, of which so much has been said on the other side of the Bar, may be referred to in support of this doctrine. As quoted by Mr Hume, it establishes a complete precedent, that it is competent to raise at once, and consequently to execute, a number of libels against an individual accusing him either of the same or of fifty different crimes.

The only rule of law as to the defence of a pannel, in such circumstances, to which our practice seems to pay any regard, and it is sufficient for every useful purpose, is this, that the prosecutor must make his choice, before going to trial, as to the indictment upon which he is to proceed against the pannel. But, in the present, of all cases, I do not know to what useful purpose it can tend to enter into this discussion at all; for if, as happens here, there is one and the same crime charged, and the same particulars are mentioned, the defence also will be the same under the different libels.

Besides, it will always be remembered, that, by the view of the law which I maintain, the first indictment is already extinguished. For either the prosecutor does virtually abandon all previous indictments, by executing a subsequent one, or the Court will, as a matter of course, desert all diets but that in which he desires to appear. And here it is upon the record of the Court, that he has abandoned the first libel; and it remains for the learned gentleman to shew by what proceeding it is possible to keep the prosecutor in Court longer than he chooses to remain. What I state is the settled practice in a multitude of cases, which are of that description that they cannot appear in the books of adjournal, or form any entry on the record. When a pannel forces on his trial by means of the Act 1701, and the prosecutor does not bring on the trial on the first indictment, but new criminal letters are raised against the pannel, these letters must be served before the expiration of the first indictment, otherwise the pannel could not be detained in prison. Now, in all the numerous cases of this description, it is plain that two libels are in existence against the pannel at once, without the diet ever being called, or

the pannel even brought into the presence of the Court, and no objection has ever been made to such a proceeding.*

In the case of Colonel Charteris, quoted by the learned gentleman who preceded me, the discussion was not as to the running of the *induciæ*, and the subsistence of several indictments at once, as he seemed to suppose, for that was taken for granted to be lawful; neither was it imagined, that on having proceeded to the trial of one indictment, all the others were not thereby extinguished. The question was, whether the pannel should not be informed, before being called on for his defence, to which of several indictments he was to answer. There was no doubt as to the competency of raising and executing them all. No person ever entertained a doubt upon that subject. The demand made was, that before the trial the pannel should be informed on which indictment the trial was to proceed; it not being admitted, or so well understood as now, that the last service extinguishes a previous libel. It is unnecessary to say more upon this first point; for it is settled by the established practice of the Court, that there may be fifty indictments subsisting at one time, if, before the pannel be made to answer or take his trial, they be all reduced to one.

The next question is as to this doctrine of pleading to an indictment, about which the learned gentleman did not chuse

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* I was not aware at this time, that on one occasion it had been thought worth while to state an objection to this form of proceeding. The circumstance is detailed in the following Note to Mr Burnet's Work, page 367: "But is it necessary, in point of form, that the diet be called and *simpliciter* deserted, as the Act ordains, in order to entitle the prosecutor to the benefit of *new criminal* letters? In practice it is not held so; and justly, for though not calling the diet be a virtual desertion of it by the prosecutor, the prisoner can sustain no prejudice by this form not being gone through, it being still competent to recommit him on new criminal letters being served. Accordingly in the case of Welsh, who had run his letters, and on that ground petitioned for liberation on the lapse of the first forty days, but who had by this time been served with new criminal letters, Lord Justice Clerk, (Hope), on advising his petition, pronounced this interlocutor: "28th October 1808, Having considered the foregoing petition, with the letters of intimation and execution herewith produced, in respect that new criminal letters have been raised and executed against the petitioner, and have been laid before his Lordship, along with the petition for his Majesty's Advocate, for a warrant to detain the petitioner in prison; refuses the desire of this petition, in so far as it prays to set the petitioner at liberty; reserving to the petitioner the benefit of any argument he may be advised to found on against being subjected to a new trial, in consequence of the diet not having been deserted *simpliciter* on the 27th current, as he alleges it ought to have been, under the Act 1701."

"Accordingly when the trial came on, on 21st November following, the prisoner founded *inter alia* upon the circumstance of the diet not having been deserted *simpliciter* when the diet of the former libel fell; but the Court held there was no necessity for an interlocutor to that effect, the non-appearance of the prosecutor being a virtual desertion of the diet, and entitling him to serve new criminal letters, in terms of the statute."—H. H. D.

to speak by itself, but only in conjunction with the other point, and about which I should have been glad to have heard what he could say; for I have not yet obtained the remotest glimpse of what the idea of "joining issue," as applicable to the case before the Court, can rest upon. The form of interrogating the pannel, as to his guilt or innocence, before naming the jury, is one of the most immaterial, I might almost venture to say, useless steps of the whole process. In England, a pannel confessing may be convicted and punished by the Court without the intervention of a jury; and, if he remain silent, he may, in certain cases, I believe, be presumed guilty; and, in others, till very lately, might have been punished by a barbarous sort of death. Now, in all this, our practice is essentially different. The Court are no more judges of the fact, in a case of confession, than where the proof rests upon any other species of evidence; and silence is, in all cases, humanely interpreted into a plea of not guilty, the prosecutor being bound to prove his charge unless expresly admitted by the accused in presence of a sworn assize.

I have looked through our law books, and, from the beginning to the end of all the authorities of the law of Scotland, there is not a word of the doctrine of litiscontestation to be found in criminal proceedings. There is no such word used by Sir George M'Kenzie, nor by Mr Hume. There is nothing in practice, or in principle, to give it support, and the introduction of it is contrary to the first principles of our criminal law. Upon what does the doctrine of litiscontestation rest? Upon an implied bargain or presumed judicial contract between the litigants. But, is that a doctrine which can be introduced here? Can a man make a lawful paction concerning his life or his liberty? Litiscontestation has no sense or meaning in this place. I have not been able to find the word, even in a pleading, except in one case reported by M'Laurin; and I wish the doctrine for ever expelled from the deliberations of this Court.

No party has at present a *jus quæsitum* in any thing. To what could the pannel here acquire a right? To his own plea? certainly not. Of what benefit could that be to him? If he plead guilty, it may to the prosecutor; if not guilty, is that of any use to himself? Is it to any act of the Court he has acquired a right? There is no act of Court in this instance. If there had been an interlocutor of relevancy, I should at least have understood the argument, but we have not yet advanced so far. This is the only ground on which I could conceive the argument of the pannel to have any

semblance of reason. But, unfortunately for the pannel, in the case I have alluded to in M'Laurin's reports, as being the only place in which mention is made of litiscontestation, there was an interlocutor of relevancy, and yet no regard was paid to the argument by the Court. The case is that of James Archibald, in February 1768. The position in support of which the idea of litiscontestation among other arguments was there advanced, was, that the Court could not desert a diet *pro loco et tempore* after an interlocutor of relevancy; but the Court deserted the diet in terms of the prosecutor's motion, and granted warrant for recommitting the pannel.

I have to submit, that the same consequence must follow to the pannel, whether you are of opinion that the libel is abandoned, or whether you go through the form of declaring it deserted. The Court cannot acquit the pannel of the charge against him. Your Lordships are not the judges of the fact. All you can do is to declare the diet deserted; and the consequence to the pannel is the same, for he may be detained in prison and indicted again next day for the same offence. To constitute the Court judges in a previous question as to the propriety of the prosecutor's conduct in insisting in or abandoning the libel, would be attended with the most extraordinary consequences, for which it cannot be supposed that the pannel's counsel are prepared to argue. It would introduce a course of procedure hitherto unknown, which, if it had been introduced in other times, might have led to the superseding of the jury altogether, and which must in any times invest the Court with the office of the prosecutor.

It was said that the Court has a discretion to exercise in deserting the diet; that it may do it *simpliciter*, as well as *pro loco et tempore*, if good grounds be shewn; and that the power of abandoning the indictment contended for takes this discretion from the Court. Mr Burnet, contrary to this statement, however, says (p. 310,) that the prosecutor is not bound to shew why he moves for the desertion of a diet *pro loco et tempore*, and that the Court must grant any motion which he makes to that effect. But I am quite willing to admit that Mr Burnet has stated this doctrine somewhat too broadly, and that he has quoted in too unqualified a manner (as he not unfrequently does), the import of a decision to which he refers in the note in its support. I perfectly coincide with Mr Hume's view of the subject, that, though the prosecutor cannot be compelled to disclose his reasons for his motion to desert *pro loco et tempore*, the Court have a discretion which, if an extreme case be made out, they may exercise by deserting the diet *simpliciter*, (Supplement,

p. 257.); though a more difficult question remains behind, to discover what benefit the pannel can possibly derive from that proceeding. All this, however, relates to the case of the prosecutor moving for a desertion *pro loco et tempore*, whereas here he has made no such motion.

I am not contending for a power inherent in the public prosecutor, without a remedy for any evil that may follow from it. All I say is, that the pannel is already out of Court as far as the first libel is concerned, and that he has nothing more to ask for by desertion of the diet of that libel, than what has happened by its abandonment by the public prosecutor. Where then, it may be asked, is the remedy in a case of oppression? The answer is, that by serving a multiplicity of libels and successively abandoning them all, the circumstances of oppression may be stated to the Court, if there be any to complain of, when by insisting on a new indictment the pannel shall at length be called upon to answer at the Bar; or the pannel may have his grievances previously discussed by presenting a petition. But it will always be remembered, that it is his own fault, by neglecting the remedies of the Act 1701, if his imprisonment shall in the meantime be prolonged a single day. And it is not easy, therefore, to conceive a more harmless application that can be made to a prisoner than the service of a series of indictments, whether relevant or not, that are never insisted in, or to imagine how any evil or oppression can arise from such a proceeding.

In the present instance, and in the present stage of the business, there is clearly no case before the Court from which the pannel has to ask relief, or of which he can complain, or on which he can be heard at all. The learned counsel for the pannel are entitled to come forward and state their hardships, if any shall occur to their fertile fancy, and they will be in order in doing so, when the pannel shall be brought again to the Bar, and the prosecutor shall insist in a charge against him. It will then be for the Court to consider, whether a case is made out that calls upon them to desert the diet *simpliciter*, rather than *pro loco et tempore*; and, after all, if your Lordships should have recourse to this unusual proceeding, I am yet to learn what benefits it would confer upon a prisoner more than the ordinary species of desertion *pro loco et tempore*, if obtained without the consent of the prosecutor. On a point on which Mr Hume has spoken with so much caution and reserve, it does not become me to say any thing. For every evil there must be a remedy; and, for all injustice there must be redress in the common law powers of this Supreme Court; but the question is,

whether the provisions of the Act 1701 are not intended to meet every case that can occur, and whether a case can possibly occur, in which the Court would be justified in adding, or attempting to add, to the safeguards of that law.

Now, my Lord, we have heard that Mr Hume's authority is against us in this part of the case, and that is an authority to which we are all disposed to bow. But I must confess, that I have not been able to discover such a meaning as has been imputed to him in any part of that learned author's work. I admit the justice of all the remarks that have been quoted. But your Lordships will observe how Mr Hume was quoted. There was nothing referred to as to his opinions of the prosecutor's power of passing from or abandoning his own instance; but passages were quoted from different parts of the book as to the desertion of the diet. I must, however, beg your attention to those passages in Mr Hume's work where he speaks of the prosecutor's power to abandon his instance; thus, 3d vol. p. 306. he says, "at any period before remitting an indictment to an assize, the prosecutor may abandon a faulty libel, and raise another in a more correct and better form." I am aware that this is not an authority directly in point, as the author is there only speaking incidentally on this subject, and we have seen how easy a matter it is to take detached passages without reference to the context and general bearing of the author's meaning, in order to support a particular purpose. Let us then see what Mr Hume says when treating expressly of the prosecutor's instance, p. 215. "As the Lord Advocate's instance is thus in one sense independent of the party injured; so it is also in this other sense, that it is entirely under his own management and disposal as to the seasons and occasions when, or the mode wherein, or the effect to which it shall be used. For in none of these points can any individual, nor even the Supreme Court, pretend to any controul or superintendence of him; as indeed," mark the conclusion, "as indeed to allow any such interference on their part, would in substance be to make the Judges prosecutors, who ought to be kept free as far as possible of all previous impressions of the case."

I submit, that if these passages be compared with those quoted on the other side, which last relate entirely to the desertion of the diet, and do not contain a word about the prosecutor's power over his instance, there will be no discrepancy or contrariety found between them. Desertion of the diet is an act of the Court; but as to the instance, the prosecutor has that entirely in his own hands. Your Lordships cannot keep the prosecutor longer in Court, not

a minute longer, than he chuses; and the pannel cannot prevent him from withdrawing, for he has all the benefit from that proceeding which he can derive from any desertion, and receives no harm from it.

As to the *inducia* of 15 days, if it be competent and proper to serve one indictment during the currency of a previous one, that question is at an end. The *inducia* of the second must run from the date of the service, else the power to serve the second would have no meaning whatever; and accordingly this will be found, on inquiry, to be agreeable to the practice. Your Lordships will remember the origin and nature of the *inducia* of citation, for an extension of which the pannel is not attempting to plead any equitable claim. The *inducia* are not founded upon statute but upon an equitable practice. No case is here made out in equity for a delay; and it certainly will not be said that there is any practice against the running of the second *inducia* before the desertion of the previous diets. If it be competent to serve three or four indictments at once, it must follow that the *inducia* of the whole may run at the same time. But at all times, before a trial is brought on, the Court will grant such delay as may appear proper in the circumstances of any particular case.

A complaint has been made that the pannel has been embarrassed with different libels in preparing his defence. To this it is a sufficient answer, that he may establish this fact of embarrassment, if he can, as the grounds of a motion for delay, (which appears to be considered a great advantage to the pannel, and is in fact the real object of this discussion) supposing him to succeed in persuading your Lordships that the first libel is not abandoned. But I have already said that there is no room here for any statement of hardship; the second indictment being the same as the first, with the omission of two or three lines. This objection, if it existed at all, would apply with tenfold force to the common case of an alternative charge of two crimes in the same libel, or to the case of a pannel served with several libels for as many different offences, when he would have ten times more difficulty in the preparation of his defence; and yet it could not be pleaded to be incompetent to make such a charge, or to serve different libels at once for different offences. This very year an instance occurred where the same individual, John Campbell, was tried on two separate libels on two consecutive days, and convicted on both.

Lord Justice Clerk.—I tried a man on two different libels upon the same day last circuit.

Mr Drummond.—It was observed, that in the proceedings of the Court of Justiciary in points of form, many cases have occurred unworthy of being followed as precedents, and many examples of loose and irregular practice. My Lord, I cannot allow this to pass uncontradicted. I have never had occasion to make such a remark myself, or to hear it made by others: On the contrary, I have always looked up to the practice of this Court as a model of accuracy and correctness in points of form. If the learned gentleman go back to bad times, he may find some things not to be imitated, but not certainly in modern times, when the practice of the Court has become more mature and perfect.

I cannot sit down without offering a few remarks upon the cases stated in the printed minute for the pannel. It is said, in the second page, "That a search from the year 1777 downwards had first been made, and the result had been communicated to the pannel's counsel some days ago: But that after this a search had it seems been made, which appears to go back to the beginning of the last century; and the statement of the cases so found was only communicated late on this day. That on the part of the pannel it may now be assumed, that the Court has before it *every one* example which his Majesty's Advocate has been able to discover, in the course of *more than a century*, of any proceedings which he thinks calculated to support the measure which has been adopted in this case, or to meet the objection founded on the clearest principles of law." This is a very erroneous statement of what has been done in point of fact. Our search began in 1777, and prior to that there was no search at all. The cases stated before are not the result of a search; and the pannel's counsel are not entitled to say that no other cases can previously be found, for the only search made was since 1777.

Upon the case of Mendham, it is observed, that "in that case the pannel had clearly no interest to make the objection, but quite the reverse." I do not think that the circumstance of a pannel having no interest to state an objection is at all a sufficient reason to exclude a case from being quoted as a precedent, as seems to be assumed. It is the duty and the practice of the Court to look to the correctness of the proceedings at trials, whether objections be made or not: A strong example of which lately occurred in the case of Bell and Douglas, where, though the guilt charged was acknowledged, the indictment was not allowed by the

Court to go to an assize. Similar examples of the discharge of this duty by the Court must be familiar to us all.

It is said, however, in this case of Mendham, that the pannel had no interest to state the objection. But, we must not look to the result in judging of this interest, but to the circumstances in which he stood at the time for making the objection. How could he know at that time the result of the objection to the relevancy? and until the Court determined as to that, it was impossible that he could know whether it was his interest to make this objection.

If you turn the page, your Lordships will find a complete shifting of the argument of interest, for, in the case of Somerville, it is there maintained that the pannel had no interest to state the objection in question, although he was found guilty and convicted. He had an interest, it would appear, to state objections to the relevancy of the libel; for this was done by some of the learned gentlemen on the other side of the Bar who defended him; and, in consequence of the objections so stated, the indictment was abandoned, and a second indictment was brought. He had, however, no interest, according to the view of the case in the minute for the pannel, to object to the trial and punishment, *because* the latter "could not exceed *imprisonment and pillory.*" Those results are not in general so coolly anticipated; but where did the learned gentleman who wrote this minute find the law, that this is the utmost extent of the punishment of perjury? and how did he lose sight of the fact in that particular case, that the pannel was over and above condemned to what was perhaps to him a still severer fate, to pay £.150 of damages, and the whole expenses of process? As to the expense, he had only the ordinary allowance of two, or at most three, counsel. Here there are a great many more. I do not pretend to enter into the secrets of the other side of the bar, but appearances, at least, are against the pannel on this ground. The trial again, it is said, could be merely put off for 15 days. Now, is not this all the pannel asks for in the present case? and yet we are told that was the reason the pannel had no interest to plead the objection in the case of Somerville; and on that occasion it was said to be as well to be convicted now as 15 days hence, though in this case the very idea of such a doctrine is reprobated as quite untenable and preposterous.

With regard to the case of Alexander Campbell, it is said, "This is not a case applicable to the point at all. There was no question about any new indictment, and the

circumstance of the public prosecutor passing from particular charges in an indictment, intending or reserving the power afterwards to raise a new indictment, is wholly immaterial to the question." I conceive nothing can be more in point than this. What is law as to one charge in an indictment, must be law as to the whole. My statement, I observe, excites ridicule—but let it be answered. I repeat, that whatever proceeding is competent for the prosecutor as to one charge in an indictment, must be competent as to the whole charges; and that whatever he can do as to one of several charges, he can do as to one charge standing alone. It will be observed, too, that this proceeding took place in the case of Campbell after the pannel had pleaded not guilty, though that certainly does not appear to me a matter of so much importance, as it cannot fail to appear to the learned gentlemen opposite from their views of this point of form. It is not disputed that the prosecutor may afterwards bring another indictment on a charge so abandoned.

It is next said, with the customary inaccuracy, "But at any rate it is humbly apprehended, that even this takes place only with the consent of the Court, which is expressed by the terms of the interlocutor of relevancy." Now, there was no consent of the Court, and there neither was nor could be any mention of it in the interlocutor of relevancy. The interlocutor finds the relevancy of the libel *as restricted*. The Court did not desert any diet, and could do nothing but proceed to the consideration of what remained after the prosecutor had withdrawn one of the charges.

Then comes the case of John Horn, who is also said to have had no interest to make this objection. He had an interest, however, to object to the relevancy of both indictments: At least, a learned gentleman, Mr Jeffrey, must have thought so, who was his Counsel, and made the objection. Now I cannot see how he had an interest in the one and not in the other, delay being the object, and the only consequence, of stating either the objection to the service or the objection to the relevancy. In this case of Horn there were two charges, uttering and selling forged notes; both of which were ultimately found relevant. The pannel did not know till after the interlocutor of relevancy that the prosecutor had any intention not to insist on the first, which was a capital charge.

The case of Bell and Douglas we are told has no analogy to the present question, because "*Bell pleaded guilty to both indictments;* and as to Douglas, the diet was deserted." But that cannot remove the case as a precedent, for the

pannel certainly had an interest to state the objection if he had thought fit to do so; nay, he had a more than ordinary interest, having his confession of the first indictment standing on the record, whatever the prejudicial effect of that circumstance may be to a pannel. The *inducie* of the two libels are proved in this case to have run at once.

With regard to the case of Hamilton, it is said that there may have been only *an intention* to raise a new indictment, notwithstanding mention is made of the "new indictment *raised*." That will not do. It is impossible to construe an indictment actually raised into an intention to raise an indictment. The remark, that the informations "might have been on the form of citation, or on other points not necessarily implying that there had been a plea to the indictment," is quite unfounded in fact. Before the Jurisdiction Act of George II. informations were given in in every case, that being a form which could not be dispensed with. Those informations contained the statement of facts upon which the pannel chose to rest his plea of not guilty, as well as the objections that occurred to him in point of law to the relevancy. In place of this cumbersome proceeding, which had become a grievance and an obstruction to the course of justice, that excellent law substituted the written defences, which, by a slovenly practice, are often neglected to be lodged, though they are in fact one of the most important steps of the whole process, and might, perhaps, supersede altogether the unmeaning and embarrassing ceremony of entering a plea before the Court, which may be immediately afterwards retracted when the Jury are sworn. The informations were in fact at that period not merely pleadings on the relevancy, but also defences, or explanations of the plea of not guilty; and it is, therefore, most erroneous to say, that though informations had been given in, it does not follow that "the pannel *had pleaded*."

As to the case of Fernie, the minute stated, "that it does not appear when the new indictments were raised." But your Lordships will see in the prosecutor's minute, page 6. that it was the very same date upon which both libels were called, consequently they must have been both previously raised, and must have subsisted together; and the *inducie* of the last must have run notwithstanding the existence of the first, which is all that is contended for. The word "raised" in this place plainly includes and implies "executed," for the diet of compearance could not have arrived unless this had been the case. That the Lord Advocate, therefore, has not power to proceed as he has done on this occasion, is a conclusion which cannot be drawn from this,

any more than from the other cases that have been mentioned; and there is no authority whatever for the statement, that "it was not imagined at that time that he had any power to abandon an indictment otherwise than by motion to the Court."

The other cases in the minute for the pannel are not in point; but they serve to shew the practice, that diets may be deserted *pro loco et tempore* even after interlocutors of relevancy.

Lord Advocate.—It is unnecessary, and it would be doing little justice to the argument, if I added one word to what has been stated.

Mr Drummond.—I omitted to observe, that the case of M'Kenzie, which Mr Cranstoun quoted from Mr Hume, vol. iii. page 16. seems to have been quite misunderstood. It obviously relates to a perfectly different question from any thing now before the Court. There the prosecutor moved the Court to desert the diet in absence of the pannel, contrary to the great leading principle, that no proceeding can take place in absence except fugitation; and the Court continued the diet, (as fugitation was not moved for), till the pannel should have an opportunity of shewing why he did not attend.

Mr Clerk.*—I am sorry it has fallen to me to answer the other side, for Mr Cranstoun had an opportunity of considering the case: I had not. I have just a general recollection of what passed last day. But I shall submit a few observations upon what was stated by Mr Home Drummond.

If your Lordships think that this practice is of considerable importance on the point, I shall begin with offering some remarks, and some inferences from them. Your Lordships have had quoted a great many instances in which the public prosecutor thought it incumbent on him to get quit of one indictment before he directed another to be served. You have a great number of instances of this practice by the most learned persons who have filled the situation of his Majesty's Advocate; and it seems to be the natural and necessary consequence of these opinions which your Lordships have from Mr Hume in several different passages of his work. I shall refer your Lordships to that

* This speech has not been revised by Mr Clerk.

practice. It is one which has been discovered in consequence of a very anxious search into the records for more than a century. We have been told by Mr Home Drummond, that there has been no regular search into the records of Justiciary. I understood that these records had been very anxiously searched; and, whether so or not, I am entitled to assume that neither party can suppose there are any other instances in the records than those which have been laid before your Lordships. These are sufficient, at least as specimens of the practice; and I must retain my private belief, that whether he is or is not entitled to say there has not been that sort of search which may be properly called a search, yet that there was such a search as to satisfy your Lordships of the general nature of the precedents to be found in these records.

Assuming this, what is the result? Upon the one hand, you have a great many instances indeed, of first indictments being abandoned—the diet being deserted—where the libel had been abandoned by the public prosecutor before the pannel had pleaded—which we never disputed his title to do. We never hinted, that he has not as good a title to abandon as he has to raise and execute an indictment, if the pannel has not been brought into Court, and parties have not joined issue. In a certain number of these instances, you have evidence of the opinions of the learned persons who conducted the business, that this is a proper and necessary mode of proceeding, because, by proceeding in that way, they put themselves to some more trouble than according to the mode now recommended by my learned friends. This is a practice as to which there could be no contradiction, for it is admitted, that, whatever is right or wrong in the present debate, the prosecutor may abandon the old and raise a new indictment. This is a practice which can only show the opinion of the public prosecutors, most learned men—and also their opinion of the way in which the Court considered these matters. It is impossible you could have the judgment of the Court upon all of these points. What are the proofs? Except in one case, it is not pretended that the point was brought before the Court at all, so that there is no judgment upon it. And as to that case, all that was said was, that there was some conversation, but no record of it—a conversation between the learned gentleman and one of your Lordships. And though I attended every diet as Counsel for the pannel, I certainly do not remember that conversation: and that is all that is brought forward as a precedent. It is a jest to say it is a precedent. It is incumbent upon

you, and you perform the duty as well as you can, to attend to the regularity of your proceedings; but where the two parties are both keen, zealous, and anxious, all the zeal of the public prosecutor on the one side to obtain justice for the public—all the acuteness upon the other side to state every thing for the defence of the pannel, in so far as useful to him, it is natural for you to take for granted that every thing is right, if nothing is mentioned as being wrong. Therefore, if an objection be not stated on either side, and do not appear from any inspection of the record, I submit to your Lordships, that to state a practice of this kind as being a practice of any authority whatever, is one of the most violent attacks upon a regular system of law that I have ever heard of, either in this Court or in any other. I was Counsel for Somerville. I dare say I attended to his interest as well as I could. He was anxious enough, I dare say, to escape conviction of the crime of which he was accused—the crime of perjury. But, notwithstanding my situation, I certainly did not consider it of that great eminence which the public prosecutor seems to think it was. I did not consider myself as acting as a great legislator upon the occasion. Nor did Mr Somerville on the pillory think he was dispensing new law for the government of your Lordships. What was done was done with consent of Somerville, and without objection.

Your Lordships watch over the regularity of proceedings—but if the pannel consent to any particular measure, and your Lordships do not observe that it is irregular, can that affect the proceeding in law, and a most important principle in law? What I apply to the case of Somerville may be applied to every one of the cases. If they could have produced one precedent—one case in which the pannel, considering it to be necessary for his defence, or of any use to him, had opposed a proceeding of this nature, and you had overruled the objection, I should have considered that precedent worth all the rest upon both sides of the question. No such precedent has been produced. And because perhaps a hundred pannels have been brought to the Bar, and a few of them have allowed this proceeding without objecting to it, possibly without having an interest to state an objection, and possibly without being aware objections might be stated, as junior Counsel are often for the pannels, they cannot be considered as precedents. It may be for the interest of a pannel that his trial should not be delayed; and instead of putting off the time of the Court with the objection, and remaining longer in prison, a pannel may often

wish his trial to proceed, where, had his Counsel offered the objection, and supported it before the Court by argument, the Court would have given it attention, and seen its propriety and force. But a pannel, by delay, may also incur farther expense, to which he will naturally be averse. This person, Mr Somerville, was not one of those mendicant clients, of which there are numbers in the Castle at this moment. He was not in the situation of the pannel at the Bar, whose Counsel, from a sense of public duty, are putting him to no expense whatever. I, for one, am proud of my situation, and every one of my learned friends is in the same situation. Somerville was put to a great deal of expense in the management of his case; and how could it have served him to delay his trial from day to day? It would not have availed him. There were Mr Fullerton and myself, and perhaps another Counsel at the Bar at his expense. There is no doubt it was his wish to go to trial upon that day.

Lord Justice Clerk.—I see from my notes you did move the Court to allow the expenses of preparing for the defence of the pannel.

Mr Clerk.—I feel great obligation to your Lordship, and so must my client the pannel, for your mentioning this circumstance; that shews there was great expense attending that trial, and as there was great expense, Mr Somerville would naturally be averse to any unavailing delay, which must have been attended by additional expense.

As to the other cases, it has been remarked by the prosecutor, that we say it was for the interest of Somerville to go on with the trial, although a conviction followed; and then he gave us a most facetious contrast, indeed, between this case and another, in which it was not for the interest of the pannel to state the objection, because the libel was not well founded, and the pannel was acquitted. In this way, says my learned friend, whether convicted or acquitted, they find an interest not to state the objection. I apprehend, such shifts as this will never stand in your Lordships' minds in place of solid argument; for, in the course of a century, I think it is strange a pannel should not find it for his interest to wave such an objection as this. Delay is generally inconvenient, and an expense to him; he has the advantage of the list of witnesses to be brought against him being given in the indictment; and he does not know what other witnesses may be brought forward under a new indictment; and it is

utterly impossible to account for the desires and wishes of men in such circumstances. One thing is certain, that, in the consideration and preparation in all cases past and to come, it has been and frequently will be the desire of the pannel to go on without stating a dilatory objection. I apprehend, that in the present case you will not particularly inquire into the motives of the pannel for stating the objection. He seems to be in a dangerous state—whether you will find against him or not, it is impossible to say, but he is in a dangerous situation, and I cannot be called upon to explain the particular motives for wishing for the delay; and, therefore, I submit to your Lordships, without making more remarks upon the particular cases which have been adverted to on both sides, that these proofs which were pleaded on by the Counsel for the Crown are not such as should have the least effect in regulating the law of the case, more particularly as the proofs are against the Crown.

But, the principle of the law is still more against them. Let us consider what is mentioned by Mr Cranstoun, the proofs of single Judges refusing bills of suspension. A pannel was tried in an inferior Court, and subjected to an ignominious punishment, of which he wished to get quit altogether or have it mitigated. In numerous cases persons so accused presented bills to this Court, and they were refused by single Judges, some of them the first Judges that ever appeared in this country. Lord Braxfield was one of them, not to mention other names. Is it possible to conceive a case, where a man so convicted, had not an interest to object to a single Judge refusing his bill? It is impossible to dispute that the practice was against the right principle, and the interest was against the practice. Yet when the point came to be tried, you were of opinion, that the practice must yield to the principle of law, as it appeared to your Lordships.

With regard to the principle of law, a few observations. It occurs to me, in the first place, that no attempt can be more desperate, or more completely unfounded, than the attempt made by the Crown Counsel to convince you that the public prosecutor has power to abandon an indictment after a pannel has pleaded. It is directly in the teeth of those authorities which we quoted to your Lordships, coming from that great master of the law to whose *dicta* your Lordships give great attention. And how is that opposed? They cannot pretend to say that we have misconstrued this authority, which is positive and express, and cannot be explained away. But they have recourse to other *dicta* of

Mr Hume as being inconsistent with this. Upon looking to these, I have to express my astonishment they could have been stated as inconsistent. The principal of them, page 305, first vol. of Trial for Crimes, and third vol. of the whole work, where Mr Hume reasoning upon another point altogether, says, " But what shall be said when the fact which is related in the subsumption of the libel, though short of the crime charged in the major proposition, amounts, however, to a lower crime of the same class; as in the case of murder and culpable homicide; hamesucken and assault; theft and swindling; notour and simple adultery; and some others? In these circumstances, and on finding that his story does not support him in his charge of the higher denomination of crime, may the prosecutor nevertheless maintain his process, restricting his charge to the lower species, and limiting his conclusions as to punishment accordingly.? This is an important question; and some diversity of opinion there has been among lawyers about it. Some have thought that there is a violation of that decorum and propriety so fit to be observed in all criminal proceedings, if any one shall be tried on a libel (the fundamental writ of the whole process) which *ex facie*, and taken as it is laid before the Court, is a disjointed, mis-shapen, and inconclusive composition; and that this consideration alone is a good reason why no such accusation ought to be sustained. But farther, say they, to shew the prosecutor any indulgence in this article, is attended with a real hardship to the pannel, who prepares for his defence against the libel as laid; and who knowing that he is secure on the ground which is taken there, will naturally be less diligent or solicitous in providing for his exculpation, in regard to any inferior degree of guilt. One, for instance, who is accused of parricide, and who knows that the person he killed was not his father; or who is accused of hamesucken, and knows that the assault was not made on the complainer at his home; may naturally conclude that this blunder is of itself sufficient to save his life; and will put himself, therefore, to less trouble with respect to those other pleas of self-defence, gross provocation, and the like, which might serve to exculpate him, or to alleviate his guilt, if he were tried on an ordinary charge of beating or of murder." Then he says, " The prosecutor, too, cannot well say that he suffers any wrong in the enforcing of such a rule; since, for ordinary, he has the means of being accurately informed of the fact before raising his libel; and if he have any doubt of the proper style of the crime, he may lay his charge for it under all the

several denominations which may eventually be found to suit the case. Nay, there is still no hardship, though he discover the weakness of his case after the execution only of his indictment, since at any period before remitting it to an assize he may abandon this faulty libel, and raise another in more correct and better form." Does Mr Hume or not correct his own errors, as they are supposed to be in the other passage he had written, as to the power of the prosecutor to abandon his libel? There is not the least hint of it. The passage quoted by my client is the passage which must be understood as limiting this general passage as to the power of the prosecutor. That he may abandon the libel there is no doubt, especially before the indictment is pleaded to; nay, after it, in a particular manner, there can be no doubt; for he has only to move the Court, who will do so, unless there be apparent injustice in doing so. Mr Hume says, first, he may abandon, and, in the second place, that he has it not absolutely in his power—that it is inaccurate in point of style to say that he does it at all—for that it is the Court in cases whether public or private. The Court could keep him to the libel if proper; and either force him to desert *simpliciter*, to the effect of having no right to bring a new trial, or hold him to the libel already pleaded to. This is Mr Hume's fair meaning. So much has been said upon this, that I shall not trouble you with any more remarks upon the power of the prosecutor to desert his libel. I may assume, he has no power without the authority of the Court. He has just the same power as a man in other instances to do what is lawful, but only in sight of the Court. Therefore any notice from him that he was to do such a thing might be very good notice that he was to move the Court, but could be nothing farther. He had power to give notice of that, and to do it; but still it was only a notice of intention, and it is not a measure till the Court interpose for the purpose. This is the sum and substance of what can be extracted from Mr Hume on the subject, the authority to which you have been accustomed to refer in all cases. As to Mr Burnet, he either is wrong, or perhaps corrects himself in another passage; and he would have admitted himself that that passage was to be understood *sub modo*, and that the Court should consent.

Let us see where the rest of the argument lies. Assuming that the public prosecutor has no power, without the act of the Court, to abandon the libel to which the pannel has pleaded, it occurs to me that a most ready way to this question is to consider the case of Charteris; and what was

done in that case; and not only what was done, but what is necessary to be inferred from that case. In the case of Charteris four indictments were raised; and my learned friends were pleased to assert, (they are better acquainted with these ancient times than we), that it was at that time a practice to raise many indictments. Many of the practices of that period are better honoured in the breach than the observance, and many of them are so by the present Court. Notwithstanding this, it was said to be the practice in those times to raise a whole bunch of indictments at the same time. This was done in the case of Colonel Charteris, who said he should not be obliged to answer to the whole. No, but answer to the one read in Court, and you may plead to this indictment. You were told the question was, whether the prosecutor could insist in four at the same time. I see no such question there. On the contrary, it is stated by Mr Hume, that some of these indictments were called for other diets. But, be this as it may, when Charteris was told he had only to plead to this indictment, what did that force the public prosecutor to do? Whether he was attempting to carry on four at the same time, or one, is of no consequence; for the Court forced the others to be abandoned. Why obliged to give up these indictments? upon what ground? Why was not the public prosecutor allowed to go on with one, suspending over the head of the pannel all the others? Why did not he say, he wished this, and the Court allow it—the Court saying, only answer one at a time, and no harm to suspend the others over your head: They are not called now, and may never be called: If you are acquitted, you cannot be tried again for the same offence: They are for the same offence, and therefore there is no harm in having these all against you. The Court would not listen to this. The prosecutor was obliged to give up the indictments, and then Charteris pleaded. That is a fair state of the case. Now, *why* did the Court *oblige* the prosecutor to give up the indictments *before the pleading?* That is a home question; and no answer has been given to it. The answer is given by Mr Hume, and a most satisfactory answer it is, and he repeats it again and again in different passages. The reason was—oppressing the pannel in the management of his defence. The Court ought not to allow that, and why? Because contrary to the rules of justice—the rules of justice which are paramount to all other rules in this Court. We were told, that an Act of Parliament is of greater authority than a law of practice of the Court. I apprehend, a judgment of the Court, proceeding upon rules of justice, is

stronger than any other precedent. I am entitled to assume, that this was considered by the Court as the justice of any case in which more than one libel would be hanging over a man's head while pleading. Mr Cranstoun put a question, would it have been competent for the prosecutor, after abandoning these, to have served them over again, or new ones to the same effect? If any public prosecutor had dared to do such a thing, the Court would have taught him his duty. If any public prosecutor had been daring enough so to tamper, and attempt to evade the justice of the Court, in a manner which would have been so grossly shameful: (I am not intending to apply any strong epithets to the proceeding before you: I think it is a mistake, and a natural one, on the part of my learned friends, to act as they have done:) but in the case of Charteris, it would have been considered a gross contempt of the judgment of the Court. What has been done in the present case? It seems that a public prosecutor cannot serve four libels at once, to the effect of bringing a pannel to trial upon one. Though he cannot do it, he can do another thing. He has no occasion to serve his libels for the same time; but immediately after the pannel has pleaded to one, he may serve half a dozen for the same offence, before that libel which has been pleaded to has been disposed of by the Court. It is ludicrous to maintain this. It is contrary to all reason that could be applied to a thing of the kind. If there is any legal principle in the case of Charteris, this is impossible.

I apprehend the question lies here. If the prosecutor was not entitled to serve a new libel, then the new libel was not served, for there is one great law of justice as of equity. "*Id tantum possumus quod de jure possumus.*" If the public prosecutor had no right to serve that libel, then you will consider that the libel was not served, and that is my reason for insisting at your Lordships' Bar, that the pannel cannot be obliged to plead to that libel. The former libel has not been deserted to this moment; you have not yet consented to it. I am not going to say any thing so insincere as this, that you will be called upon to refuse your consent, when proposed on the motion of the public prosecutor. But the public prosecutor has taken a high station here. He refuses to move your Lordships to desert the diet; and therefore you have never had an opportunity of considering the point, whether it should be deserted or not. If the diet had been deserted this day, before we began to state this point to your Lordships, there is another ground sufficient

for us which would have arisen. I shall not plead any thing without an interest. I am entitled to tell them, the libel would in that case have been considered as served this day, that I may have time to prepare my defences. I shall not enlarge upon the hardship which might arise to the pannel, from being obliged now to answer to this libel. It is sufficient for me, that the practice which has been followed here is contrary to the established practice before your Lordships, and the best prosecutors have uniformly deserted libels before serving second indictments. There may be hardship in this case, and there might be greater in others. As to the case which was stated by Mr Cranstoun, of two libels depending at the same time, and one of them where the pannel was to be tried in Edinburgh, and another at Aberdeen, that proceeding would be so harsh and unjust, that even leaving matters to the discretion of your Lordships, (which every sound rule of jurisprudence is against, for the Court should have no discretion as to such matters,) you would interpose a remedy for the evil. But the rule of law is not more against such a proceeding than against the present. I should have no apprehension of the consequence in that case; for, till a total desertion of law and justice in the country, such a thing could not be admitted. But, is it no hardship to be perplexed with two libels at the same time? The question of relevancy is attended with the greatest nicety and difficulty, and has given Counsel a great deal of trouble already—and is there no hardship in having to give as much consideration to a new libel? That former libel was attended with so much difficulty, and occupied so much of the attention of the pannel's Counsel, that there is no saying what pleas might have arisen to them under that libel, and prevented them from paying attention to the new libel. What if the Counsel in the former case had not thought it incumbent on them to support the pannel in the present case? What if he had been deserted by his agents? I do not suppose there is any chance of that in this case; but this signifies nothing at all to a general rule, to which your Lordships should adhere in all cases. There have been cases, in which a man has been defended by Counsel and agent in one indictment, who did not think it incumbent upon them to defend him in another. It was said, that the pannel had notice a considerable time ago that the libel was to be abandoned. That was an accommodation given. But what if the public prosecutor had given no such notice? It was not incumbent

on him to give any notice. And as the pannel would have been brought to this Bar, with his Counsel and agents ready to defend him in the former case, after bestowing great attention upon it, but not prepared to defend him in this case; is not that a situation which your Lordships would take into consideration, if any thing depends upon the possible hardship? The Counsel and agents might have been brought to your Lordships' Bar, under the impression, that the trial was to go on on the first indictment. When they come, ready to defend him, they are told that that case is not to be tried. The prosecutor prays the Court to desert the diet *pro loco et tempore*, and then proceeds upon a new indictment, of which the Counsel and agents had no notice whatever. Having held this out against him, he finds the whole trouble, research, time, and expense of previous preparation, thrown away, and that he must be ready, upon the most summary warning, to proceed to trial on another indictment.

I may be told, such a case can hardly happen, in which the pannel can be deprived of the whole *induciæ;* but, if he may be deprived of even a part of the *induciæ*, he may thereby lose the assistance of his agent and Counsel, and what is more, may be deprived of the most material witnesses.

We are told, that, in this indictment, there is only an alteration in a few words of the former. There is the very greatest difference between the two indictments; which is most difficult to defend, it is not for me to say. The major proposition is the same in both; but the minor is essentially different; and the two require different sorts of arguments.

Lord Hermand.—Objection not very material at first, has now as to the pannel's interest dwindled into nothing. For as it is not pleaded that the second indictment is null, so as soon as fifteen days elapse from the abandonment by the prosecutor, he can be brought to trial. But it is argued there is a distinction where pannel has pleaded, *i. e.* uttered the words 'not guilty,' for that, it is said, constitutes litis-contestation. Doubts if that be a phrase in criminal law. It does not occur in any one authority. But if it be, it must be understood as *in civilibus*. Litiscontestation, however, is not constituted by defences nor by pleading, it never takes effect till an act be extracted, not an act and commission of modern introduction; but an act for proof before the Court, or before the Ordinaries on oaths and witnesses.

On this analogy the powers of the prosecutor continue till a jury be impannelled, and so was found in the case of

Archibald, 1708. On this ground I cannot agree to strike out of the list of cases those in which 'not guilty' has not been pleaded. On the other hand, pannel's argument cannot be redargued on what is called list of cases beyond the period of search. Additional cases are given in for pannel, in all of which the diet had been expressly deserted; but precedents enough remain to settle the law.

In 1st case, Lawson.—Diet deserted.

In 2d case, Burns.—No desertion, and trial proceeded on second indictment.

In 3d case, Berry.—Same procedure.

5. Mendham.—Argument that pannel had no interest to object;—not understood.

7. Lindsay Crawfurd.—A serious case, yet without desertion; trial proceeded on second indictment. It is argued, that in none of these cases was the objection pleaded. Why? because it was not thought relevant: The whole Bar has been in a dream, till the ingenuity of the Counsel here discovered what had been hid from their predecessors, though with all deference to them not their inferiors in ability; and the same observation equally applies to the Court.

Is not this sufficient to establish a point of form? In one case, however, the objection was brought into view by myself, Ballantine *against* Sommerville.

My notes correspond with Mr Drummond's. An objection by a Judge is as strong as that by a Counsel.

In 10th case, Horn.—No desertion, and trial proceeded on second indictment. That second indictment is competent, inveterate usage proves.

Lord Gillies.—This objection came unexpectedly, and we gave our opinions immediately after it was stated. It happens that the opinion which I then delivered is that which I have formed after all I have since heard of the case. The opinion I gave was, that the first indictment was not abandoned by the service of the second. I understood the plea stated on the part of the public prosecutor to be, that by serving a second indictment the first was abandoned, and that there was therefore no occasion for deserting the diet. I think this doctrine erroneous. I think the first indictment did not fall by the execution of the second; and the consequence is, that as there are two indictments subsisting against the pannel at the same time, one of them must be disposed of before the other is proceeded in. The service of the second indictment does not appear to me to be null,

but the prisoner must be entitled to such delay as your Lordships may think reasonable, to prepare for his trial upon it.

I conceive it to be certain that the Court would think it a piece of great injustice, if the public prosecutor, after serving a second indictment, should insist on proceeding with the first; but I know no principle or practice which entitles me to say he cannot do this. But whether he would be entitled to go on with the first or not, the prisoner may be entitled to insist that he should go on with it. What is the answer made to this? A broad assertion that the public prosecutor has entirely the controul over his own instance, —that he may abandon it whenever he pleases,—and that we cannot insist it shall be prolonged a single moment after he pleases. He has certainly a controul over his instance, —he may pass from his first indictment,—but what is the consequence? The Court pronounces an interlocutor deserting the diet, and in such terms as they think proper. If he passes from it for no reason, or for bad reasons, your Lordships may desert the diet *simpliciter*. You have the same power of checking him as any private prosecutor.

The assertion, that "his Majesty's Advocate possesses an uncontrolled power over his instance in all stages of a criminal process," if it is to be taken literally, is directly in opposition to the doctrine laid down in the case of Archibald in 1768; but if it merely means that he possesses an uncontrolled power over his instance, subject to the controul of the Court, then it means nothing but what I have already said, that although the public prosecutor may withdraw his instance, yet the effect of his doing so is, that the Court is called upon to desert the diet, but in such terms as they think proper,—*pro loco et tempore*, with right to him to insist again; or if the prisoner shews that he acts improperly, then your Lordships can desert it *simpliciter*.

I must say generally, that I am not in any case for introducing novelty in points of practice, or doing any thing inconsistent with established law, by which a pannel may be prejudiced, or which has a tendency to increase the power of the public prosecutor. His powers in this country are far greater than in the neighbouring kingdom—greater perhaps than in any other country. I do not state they are greater than they ought to be. But as they are so great they should be watched by us. Viewing the matter in this light, I think it proper to state, that the prosecutor having raised a second indictment, the Court may, upon his motion, desert the diet *pro loco et tempore*. It remains for the prisoner to

shew, if he can, that the second indictment has been raised and the first abandoned for unjustifiable purposes; and if he can make out this, your Lordships will desert the diet *simpliciter*.

I state these matters with reference to general principle, and not to any thing which has occurred. For there is no plea here of actual hardship, and the pannel cannot be exposed to any injury whatever from what has taken place.

The only point upon which I gave no opinion formerly is now one of the pleas of the pannel, that the service of the second indictment is null in consequence of the first indictment not having been deserted. I said formerly I did not think so, and I remain of that opinion. That opinion is formed upon considering the precedents mentioned in the additional minutes.

With reference to the practice, I need add nothing to what has been said. As to the case of Somerville, we are informed that the difficulty was started; and what was the consequence? The objection on being argued was overruled. In that case, after an indictment had been raised, executed and pleaded to, the Court, without deserting, proceeded to the trial on the second. I had the honour to sit as a Judge upon that trial, and I think we were wrong. I think it was the duty of the Court to have disposed of the first indictment by interlocutor before proceeding to trial on the second; and, in not doing so, our proceedings appear to me to have been erroneous. The proceeding in the case of Hamilton, in which Duncan Forbes "consents to the deserting of the diet without prejudice to him to insist in the new indictment," appears to be more correct than that in Somerville's case. "The Lord Justice Clerk, &c. in respect of the above consent, desert the diet upon this indictment, without prejudice to the pursuer to insist upon the new indictment as accords." That is the principle upon which I proceed, and that is the precedent which ought to be followed. For I cannot subscribe to the doctrine, that a libel, after having been pleaded to, may be abandoned in any circumstances in such terms as the Lord Advocate chuses to dictate. All that remains is the question, what delay shall be given to the prisoner? At present I give no opinion on that.

Lord Pitmilly.—I have no reason to think, except from the anxiety displayed by the prisoner's Counsel in arguing the point, that the question at issue is of any importance to the prisoner; but it is of importance to the law and to the practice in this Court; and I trust, that, after having

heard and read so much on the subject, we shall be able to pronounce an interlocutor which will set this matter on a proper footing in time to come.

The argument so ably stated by Mr Cranstoun is now reduced into writing, and stands upon the record of the Court; and it appears to me, that in the radical point there is a material error on that side of the bar. It is said in the Minute for the prisoner, that it is incompetent to serve one libel while another, by having been pleaded to, is still current against a pannel. This is the first and radical question. We must first consider whether a second libel can be served while a former is in dependence, and the pannel has pleaded guilty or not guilty to it. Now, upon this point I maintain, there is no authority in the text-books, nor in the precedents of this Court, for the proposition advanced by Mr Cranstoun,

A distinction has indeed been taken between the case of a prisoner having pleaded to the first indictment, and his not having as yet been called upon to plead; and it is true that many of the decided cases which have been noticed, refer only to the case of the pannel not having pleaded. The case of Lawson in 1785—of Burns and Veitch in 1789—of Berry and Robertson, and Callendar in 1793—of Scott in 1794—of Lindsay Crawfurd and Bradley in 1812; the older cases of Nicolson in 1711, and Inglis in 1720, were all of them cases in which the pannel had not pleaded to the indictment; and, in such cases, it is admitted by the prisoner's Counsel in the argument which we have heard, that a second indictment may be served.

But I must venture to state that there is no room for the distinction in principle between the case of a prisoner having pleaded, and his not having pleaded to the indictment, in so far as concerns the right of the public prosecutor to serve a second indictment upon him. If there was room for this distinction, the diet could never be deserted after the prisoner had pleaded to the indictment, and an interlocutor on the relevancy been pronounced;—the prisoner would have a *jus quæsitum* in the proceedings—he would be entitled to say that the Court has no power to desert the diet. This point was most ably argued in the case of Archibald, in 1768, which is reported in M'Laurin's cases. There was much learning displayed in the argument, and the report of the case has assisted me in forming my opinion on the question now before us. It was contended in the case of Archibald, that the pannel having pleaded to the indictment, and an interlocutor of relevancy having been pro-

nounced, the diet could not be deserted. But, in the face of this plea, it was found by the Court that the public prosecutor had a right to call upon the Court to desert the diet, and they did desert accordingly.

The truth is, that it is incorrect to speak of joining issue or of litiscontestation in criminal matters; the reason is, that there is no room for the contract upon which, in civil causes, litiscontestation proceeds. The diet may be deserted at any stage of the procedure until the *assize* is *set*. "We have now," (says Mr Hume, when treating of this subject, vol. ii. p. 86.) "advanced to that period of a criminal process when it assumes a new shape, and is in several respects materially altered in its nature by the naming and swearing, or, as we call it, *setting* of the assize of fifteen persons, who are to pass on the trial of the prisoner. In particular, that step is attended with this change in the condition of the process, that the prosecutor no longer has it in his power for any reason to obtain a desertion of the diet, but must let his interest take its fate with the libel. Until then, and even after interlocutor of relevancy, the prosecutor, on good cause shewn for it, may still be allowed to desert the instance *pro loco et tempore*, and save his right of insisting anew, at a more convenient time and on another indictment," &c.

Accordingly, we have a number of authorities for the proposition that the public prosecutor may, before the assize is set, desert the diet, and serve a second indictment on the pannel. We have the old cases of Hamilton in 1714, of Fernie in 1720; the case of Mendham in 1804, of Somerville in 1813, of Horn in 1813, and of Bell and Douglas in 1817. There are these six cases at different periods in the practice of this Court, in which a second indictment has been served before the first was disposed of. It has been suggested, that the Court proceeded incautiously in allowing the second trial to proceed before the first indictment was disposed of. I shall speak to that point afterwards. At present I am considering whether the second indictment was regularly served; and the cases now referred to are quite invincible authorities to show that a second indictment may be served while a first is undisposed of. If this were a nullity and incompetent, is it possible to suppose that the Court would have allowed the trial on the second indictment to proceed? The cases now mentioned leave my mind without a shadow of doubt, that a second indictment for the same crime may be served while a former one is not disposed of and has been pleaded to.

There was an attempt made to rear an argument against this proposition, on the circumstance that the diet cannot be deserted without the leave of the Court; and it was said the second indictment ought not to be served, pending the first, because the *inducia* are given to enable the pannel to prepare his defences, and he cannot prepare himself when he is uncertain which of two charges he is to meet. This, however, is merely an equitable plea against going to trial on the particular day, and is just one of those pleas which must be left to the discretion of the Court. A pannel comes forward, and states that he is harassed by the depending of two indictments, and therefore he moves the Court that the trial should be delayed. This does not prove that the service of the second indictment was irregular, and a nullity; but it may be a good reason for granting delay.

Here, then, I bottom my opinion. My fundamental proposition is, that a second indictment may be served while the first is not disposed of, and has been pleaded to.

The second link in the argument is, that if the service of the indictment was regular, then the *inducia* of fifteen days must run from the date of the service. The *inducia* cannot run from the abandonment or desertion of the first libel. There is no period known to me from which the *inducia* can run but from the period of service.

The second indictment, then, was regularly served, and the *inducia* run from that date.

In the next proposition all are agreed, viz. that no person can be made to answer upon more than one indictment for the same offence. The question then comes to turn upon this single point, Whether it is necessary in point of form for the Court to desert the diet of the first indictment? or whether it shall be held as virtually abandoned by the mere service of a second indictment? This is the only question before the Court, Whether upon a pannel coming here with two indictments, both regularly served, is it necessary, in point of form, to desert the first by an interlocutor of Court; or whether is it already virtually abandoned by the service of the second? The whole question comes to this, and the opinion I give upon it, after looking to the precedents, is, that it is more regular to desert formally *when the pannel desires it.*

I am aware that the doctrine of virtual abandonment has been acted upon in many cases. But in none of these cases was it explicitly brought under the notice of the Court, except in the case of Somerville, and in that case no objection to it was taken by the pannel. It does, therefore, appear

to me, that when it is seriously objected by a prisoner, as in the present case, that a first indictment is hanging over his head, we should desire a Minute from the prosecutor passing from the first indictment, and should pronounce an interlocutor deserting the diet.

At the same time it is plain that the pannel could not suffer any injury from the *virtual* abandonment; because the prosecutor, by executing a second, means to abandon the first. The pannel, too, knew, that the moment a second was served, he was quit of the first. Knowing this, he was free from any perplexity arising from a double plea. Therefore there is a great deal of equity in the doctrine that the first indictment falls *ipso jure*, by the serving of a second for the same crime, and I would not be for altering the practice when the pannel makes no objection. But when the pannel comes and states that there is a first indictment hanging over him, and desires it should be given up, the Court should declare it deserted, and then the pannel should go to trial on the second indictment. The result is, that the trial proceeds upon the very day to which the *inducia* run. On Monday last we had nothing to do in this case but to declare that the first indictment was at an end; and the second being regular, and the *inducia* having run, we might have proceeded to the trial, or might have given a delay if asked for, and upon cause shewn for the indulgence.

Lord Reston.—The Judges who have gone before me have anticipated the grounds of my opinion. I am not ashamed to confess that I have altered my opinion. There are two questions to be decided. One is, whether we are entitled to take into consideration the second indictment till the first is expressly abandoned. And the second is, whether the service of the second is to be considered a service at all, as the first was not expressly abandoned. I confess that last day I was of opinion that both these points should be decided in favour of the pannel—that the authority of the Court was necessary—and that the former service, before authority was obtained to the abandoning the first indictment, was not a good one. But, upon considering the subject further, I think I was wrong, in part, in that opinion. I think the prosecutor has no right to pass from his libel, to the effect of making us consider a new one without the authority of the Court. After a first indictment has been pleaded to, the authority of the Court should be had for its abandonment.

The more important question remains, whether the service of the second, during the pendency of the first, is a nullity or a good service. I am quite clear, from the precedents which have been stated by my brethren, that the prior service is a good service. The pannel's Counsel have admitted, that if the pannel had not pleaded, this service was a good service. Now, I cannot see what difference can be made by his pronouncing the words "Not Guilty." If litiscontestation were to go into account, it would be the impannelling of the Jury which was to constitute it. Before the Jury is sworn, and after the pannel has pleaded not guilty, all objections are open to him, not merely preliminary objections to citation, &c. he may state objections to the relevancy of the libel. On the other hand, the prosecutor is not precluded from getting the diet deserted *pro loco et tempore*, any more than if no pleading had taken place. The legal *induciæ* must run from the service of the second indictment. But the Court will never refuse any equitable delay which may be asked by the pannel.

Lord Justice Clerk.—I concur in opinion with all of your Lordships, that when objections are taken and answered in the anxious manner adopted in the present case, with regard to a matter of form and practice in our procedure, we ought to take every means of information, and decide with deliberation; and so far from regretting the time which has been spent in this discussion, I have to express my satisfaction, that on the former occasion we adopted the course which was followed of ordering a search into the practice of the Court. But, now that we have the result of that search before us, we are called upon to say, whether the public proseeutor, having, during the dependence of an indictment which has been pleaded to, and upon the relevancy of which Informations were ordered, executed a new indictment, is entitled to proceed upon it against the pannel. I concur with my learned brother on my right hand, that this is the fundamental and preliminary question, and that upon it it is necessary to form our opinions in deciding this case. But after the very clear and luminous statement from the learned Judge to whom I allude, I should be guilty of undue encroachment upon your Lordships' time if I were to enter into a detail of the grounds of my opinion as to that preliminary objection. I shall only say in one word, therefore, that upon a careful consideration of the argument upon the principle and train of practice now before us, I have formed a clear, and will venture to say, an unalterable

opinion, that there is nothing in the law or practice of this Court to prevent a public prosecutor from serving a second indictment during the dependence of a prior one; and that when the legal period of *induciæ* granted by custom to a pannel has expired, the prosecutor may proceed upon that indictment. As to what he is to do upon the second, that is a different question. But as to the power of serving a second indictment in such circumstances, I do not entertain a shadow of doubt. It seems completely conceded by the learned Counsel for the prisoner, that such has been the practice, and a practice to which no objection can be stated, where a pannel has not pleaded to an indictment. It appears, however, to me, that the moment that concession is granted, there is nothing to hinder a second indictment being served in all cases. For we are brought to very narrow ground indeed, if the whole objection be, that the first indictment has been read and pleaded to; as, after the most careful attention to the distinction taken, I can find no authority whatever for it in law. I am of the opinion already delivered to your Lordships, that there is no foundation for assimilating what is called litiscontestation in this case, to what occurs in civil cases. That point, as far as it could apply, was argued, and in reality decided, in the case of Archibald, against the pannel. Your Lordships see, from the report in Maclaurin, that the Court had every thing before them that could be urged as to litiscontestation precluding the desertion of diet and the service of another indictment; but the decision there went in fact on the ground that there was no litiscontestation in the sense in which it occurs in civil cases; and, at all events, that it could only take place where an indictment has been remitted to the knowledge of an assize. If, therefore, the public prosecutor may raise a second indictment, and proceed upon it at the end of the *induciæ*, it takes the bottom out of the only difficulty which occurs in this case, and the only solid argument stated in support of the objection. For I am clear that no prejudice could arise to the pannel by the procedure objected to. There is one view of this subject to which I beg your Lordships' attention. Suppose the *induciæ* of a new indictment raised in this case had run to the 20th of May, the diet of the former having been continued till the 19th, it is perfectly clear, that if there had been no meeting of Court on the latter day, the instance on the former indictment would have been extinguished, and no proceeding could have taken place upon it, and nothing would have been required to be entered upon your Lordships' record.

On the 20th of May, however, his Majesty's Advocate would be entitled to move the Court to take up the indictment, the *inducie* of which had run, and the diet must of course have been called. Now, could it have been said there was any thing of the nature of litiscontestation, or that the pannel had a *jus quæsitum* which could have required the interference of your Lordships? There is no authority for requiring it to be shewn the instance has been extinguished, and therefore to that extent the public prosecutor must be held to have abandoned his charge without the necessity of applying to your Lordships. Your Lordships neither have nor would have given the slightest impediment to that proceeding, but must have taken up the second indictment, and have held that with regard to the former indictment there was an end of the case.

But it was said, where the diets happen to fall on the same day the case is altered, and your Lordships are called upon to adopt a proceeding which the pannel says may be favourable to him. If any ground were to be made out for supposing that a pannel could be regarded as standing in the situation Charteris is said to have been placed in, then your Lordships by your authority would afford a remedy for any such hardship. If you saw the public prosecutor (which I cannot suppose possible) attempting to harass a pannel by raising against him a number of indictments in succession, and leaving him doubtful upon which he was to be tried,—or take the supposition of several new ones being raised after his pleading to the first, you would exercise that power with which you are entrusted for the good of the country, and afford immediate relief. But if, on the other hand, your Lordships hold, as I do, that after service of a second indictment, both being regular, the public prosecutor has thereby declared, that it is upon the second, and that alone, he means to proceed, and is not entitled afterwards to turn round and say he will go back to the first, there is not only no injury which can arise to the accused, but he has a greater advantage than he could have upon the rule of law he now contends for, of both indictments being held to subsist, and that your Lordships should interfere to have the desertion of the first recorded. The case of Charteris, I think, has not been looked to with so narrow an eye as is proper. It appears from Mr Hume, that Charteris had four indictments served upon him, and that he put in a printed petition stating the hardship of his case, before he was brought into Court for trial, praying for the authority of the Court

to call upon the Lord Advocate to declare what was the course he meant to follow, and upon which indictment he meant to allege the guilt of the prisoner. The answer was made by the public prosecutor as to the one upon which he meant to rest, and it was after that that the trial proceeded, and the Court declared the others abandoned. The diet of none of them appears to have arrived. But if any such proceeding as this was to be attempted, your Lordships would require no statute, no recourse to books, but only the dictates of your own consciences to know what you should do, as I have not a shadow of doubt in my mind, that a public prosecutor is not entitled to vacillate between his different charges, but that the service of a second must preclude him from going back to his first.

With regard to the practice, I am bound to say with your Lordships, that when it is looked narrowly into, it does not appear to me to rest upon so clear and indisputable a basis, as that it would be right for your Lordships to adopt it at once as the rule of the Court. It was a fair observation, that in some cases a pannel might wish to wave this or other objections; and in the case of Somerville, I see an obvious ground upon which he wished to go to trial; as the second indictment being cleared of the objection stated to the first, he had no object to ask for fifteen days more. He had no palpable or tangible interest in view, his witnesses being present, and he might have suffered prejudice if delay had taken place. Mr Clerk said he would have moved for delay on account of the absence of four witnesses at the first trial, but they were present at the last. He moved, however, for what was a substantial interest; namely, the expenses of the first indictment, but did not notice the propriety of doing away with it on the record; and there was an opinion given, that the question of expenses should be delayed till the issue of the second trial. I am clear, therefore, there was no interest in that case to insist upon the objection, which would have merely led to a fortnight's delay. This same consideration may apply to other cases, and it is better to follow the straight forward course, without entangling ourselves with former doubtful cases not precisely in point.

Having formed a clear opinion, that there is no principle, authority, or *dictum*, to induce us to think that the *induciæ* had not run from the period of service, merely from the circumstance of the two diets having occurred on the same day; I am for following that course as to which we have so clear an example in the conduct of a lawyer of the first eminence, I mean Mr Duncan Forbes, who expressly

consented that the diet should be deserted without prejudice to his right to insist on the new indictment which he had raised.

Although I have a clear opinion that the *inducíæ* here run from the date of service, in this and in every other case, if a person accused should state to the Court reasonable grounds for delay, I would attend to them. I am now only giving my opinion upon the law.

The Court then pronounced the following interlocutor :—

" The Lord Justice Clerk and Lords Commissioners of Justiciary having resumed consideration of the objection stated in bar of trial at last sederunt, with the answer thereto, minutes of search as to the practice in similar cases given in in obedience to the order of Court, and heard parties procurators further: Find that the service of the second indictment during the currency of the first indictment was competent; but in respect that his Majesty's Advocate has judicially declared that he has abandoned the first indictment, desert the diet of that indictment without prejudice to the prosecutor insisting against the pannel on the second indictment as accords: Find that the service of the second indictment upon the pannel on the third day of May current, being fifteen free days before the day of compearance, gave him the benefit of the legal *inducíæ*, and therefore repel the objection on that plea, and ordain the pannel to plead to the second indictment."

(Signed) " D. Boyle, I. P. D."

Lord Justice Clerk.—William Edgar, are you guilty or not guilty?

William Edgar.—Not guilty.

Mr Clerk.—I hope you will permit me to say, that so much of our time and attention have been already occupied, it would be extremely hard upon us to proceed now to argue upon the relevancy, upon which we have a great many considerations to offer. I need not suggest a particular time for your Lordships. I do not think it would be proper to attempt any encroachment upon your Lordships. I think you cannot go on with the trial before Monday next.

" The Lord Justice Clerk and Lords Commissioners of Justiciary continue the diet against William Edgar, pannel,

till Monday next at ten o'clock forenoon in this place, and ordain parties, witnesses, and assizers, and all concerned, then to attend, each under the pains of law, and the pannel in the mean time to be taken from the Bar back to the Castle of Edinburgh."

THE

TRIAL

OF

ANDREW M'KINLEY,

FOR

ADMINISTERING UNLAWFUL OATHS.

2d June, 1817.

PRESENT,

The Right Honourable DAVID BOYLE, *Lord Justice Clerk.*

LORD HERMAND.	LORD PITMILLY.
LORD GILLIES.	LORD RESTON.

Counsel for the CROWN.

The Right Honourable ALEXANDER MACONOCHIE of Meadowbank, *His Majesty's Advocate.*
JAMES WEDDERBURN, Esq. *Solicitor-General.*
HENRY HOME DRUMMOND, Esq. *Advocate-Depute.*

Counsel for the PANNEL.

JOHN CLERK, Esq.	J. P. GRANT, Esq.
GEORGE CRANSTOUN, Esq.	J. A. MURRAY, Esq.
THO. THOMSON, Esq.	JAMES MONCRIEFF, Esq.
FRANCIS JEFFREY, Esq.	HENRY COCKBURN, Esq.

LORD ADVOCATE.—Before your Lordships call this diet, I have to state to the Court, that, upon the 20th of March last, the pannel was served with an Indictment to stand trial upon the 5th of April. To that indictment he was never called upon to plead, and a new libel was afterwards raised

against him, the diet of which was continued on different occasions.

The first of these indictments I have abandoned; and though, according to my own understanding of the import of the precedents which have been laid before the Court in the case of Edgar, there is no occasion for entering this on the record, yet I have no objections to this being done, if it be desired.

LORD JUSTICE CLERK.—Your Lordships will just make a similar order here to that made in the case of Edgar.

The following entry was then made upon the record:—

"The Lord Justice Clerk and Lords Commissioners of Justiciary, in respect of what is above represented, desert the diet of the first indictment against the said Andrew M'Kinley, reserving to His Majesty's Advocate to insist upon the second indictment, as accords."

LORD JUSTICE CLERK.—Andrew M'Kinley, attend to the indictment against you which is now to be read.

"ANDREW M'KINLEY, present prisoner in the Castle of Edinburgh, you are Indicted and Accused, at the instance of ALEXANDER MACONOCHIE of Meadowbank, his Majesty's Advocate, for his Majesty's interest: That albeit, by an Act passed in the fifty-second year of his present Majesty's reign, entitled, "An act to render more effectual an Act passed in "the thirty-seventh year of his present Majesty, for prevent-"ing the Administering or Taking Unlawful Oaths," it is *inter alia* enacted, "That every person who shall, in any "manner or form whatsoever, administer, or cause to be ad-"ministered, or be aiding or assisting at the administering, of "an oath or engagement, purporting or intending to bind the "person taking the same to commit any treason or murder, or "any felony punishable by law with death, shall, on convic-"tion thereof by due course of law, be adjudged guilty of fe-"lony, and suffer death as a felon, without benefit of clergy." And further, by section fourth of the said Act, it is enacted, "That persons aiding and assisting at the administering of "any such oath or engagement, as aforesaid, or persons "causing any such oath or engagement to be administered, "though not present at the administering thereof, shall be "deemed principal offenders, and shall be tried as such; "and, on conviction thereof by due course of law, shall be "adjudged guilty of felony, and shall suffer death as felons,

"without benefit of clergy; although the persons or person "who actually administered such oath or engagement, if "any such there shall be, shall not have been tried or con- "victed." And further, by section sixth of the said Act, it is enacted, "That any engagement or obligation whatsoever, "in the nature of an oath, purporting or intending to bind "the person taking the same to commit any treason or mur- "der, or any felony punishable by law with death, shall be "deemed an oath within the intent and meaning of this Act, "in whatever form or manner the same shall be administered "or taken, and whether the same shall be actually administer- "ed by any person or persons to any other person or persons, "or taken by any other person or persons, without any ad- "ministration thereof by any other person or persons:" Yet true it is and of verity, that you the said Andrew M'Kinley are guilty of the said crimes, or of one or more of them, actor, or art and part: In so far as you, the said Andrew M'Kinley did, at secret meetings, and on other occasions, at Glasgow, and in the vicinity thereof, in the course of the Months of November and December, 1816, and January and February, 1817, wickedly, maliciously, and traitorously administer, or cause to be administered, or did aid or assist at the administering, to a great number of persons, to the amount of several hundreds, an oath or engagement, or an obligation in the nature of an oath, binding or purporting, or intending to bind, the persons taking the same to commit treason, which oath, engagement, or obligation, was in the following terms, or to the following purport:—"In awful presence of God, I, A B. "do voluntarily swear, That I will persevere in my endea- "vouring to form a brotherhood of affection amongst Britons "of every description, who are considered worthy of confi- "dence; and that I will persevere in my endeavours to ob- "tain for all the people in Great Britain and Ireland, not "disqualified by crimes or insanity, the elective franchise, at "the age of twenty-one, with free and equal representation, "and annual parliaments; and that I will support the same "to the utmost of my power, either by moral or physical "strength, as the case may require: And I do further swear, "that neither hopes, fears, rewards, or punishments, shall in- "duce me to inform on, or give evidence against, any mem- "ber or members, collectively or individually, for any act or "expression done or made, in or out, in this or similar socie- "ties, under the punishment of death, to be inflicted on me "by any member or members of such societies. So help me "God, and keep me stedfast:"—Which oath, or engagement, or obligation, to the foregoing purport, did bind, or did pur-

port or intend to bind, the persons taking the same to commit treason, by effecting, by physical force, the subversion of the established government, laws, and constitution of this kingdom, and especially by obtaining annual parliaments and universal suffrage by unlawful and violent means. And, more particularly, (1.) at a secret meeting held at the house of Hugh Dickson, then weaver in Abercromby Street, or Calton of Glasgow, or elsewhere at Glasgow, or in the immediate vicinity thereof, you the said Andrew M'Kinley did, upon the 20th day of December, 1816, or upon one or other of the days of that month, or of November immediately preceding, or of January immediately following, wickedly, maliciously, and traitorously administer, or cause to be administered, or did aid or assist at the administering an oath, or engagement, or obligation, in the terms above set forth, or to the same purport, to Peter Gibson, John M'Lauchlane, John Campbell, and Hugh Dickson, all present prisoners in the Castle of Edinburgh, or to one or other of them, and to other persons, whose names are to the Prosecutor unknown, the said oath, or engagement, or obligation, to the said purport, binding the persons taking the same to commit treason, as said is. And, further, (2.) you the said Andrew M'Kinley did, upon the 1st day of January, 1817, or on one or other of the days of that month, or of November or December immediately preceding, at a secret meeting, held in the house of William Leggat, change-keeper, King Street, Tradestown, in the vicinity of Glasgow, or elsewhere at Glasgow, or in the vicinity thereof, wickedly, maliciously, and traitorously administer, or cause to be administered, or did aid or assist at the administering, an oath, or engagement, or obligation, in the terms above set forth, or to the same purport, to the said Peter Gibson, John M'Lauchlane, John Campbell, and Hugh Dickson; as also, to James M'Ewan, now or lately carding-master at Humphrie's Mill, Gorbals of Glasgow, and M'Dowall Pate, or Peat, now or lately weaver in Piccadilly Street, Anderston, in the vicinity of Glasgow, who, conscious of their guilt in the premises, have absconded and fled from justice; as also, to John Connelton, or Congleton, now or lately cotton-spinner in Calton of Glasgow, or to one or other of them, and to other persons, whose names are to the Prosecutor unknown, the said oath, or engagement, or obligation, to the said purport, binding the persons taking the same to commit treason, as said is. And, further, (3.) you the said Andrew M'Kinley did, upon the 4th day of January, 1817, or on one or other of the days of that month, or of November or December immediately preceding, at a secret meeting, held in

the house of Neill Munn, innkeeper and stabler in Ingram Street, Glasgow, or elsewhere at Glasgow, or in the vicinity thereof, wickedly, maliciously, and traitorously administer, or cause to be administered, or did aid or assist at the administering, an oath, or engagement, or obligation, in the terms above set forth, or to the same purport, to the said Peter Gibson, John M'Lauchlane, John Campbell, Hugh Dickson, M'Dowall Pate, or Peat, and James M'Ewan; as also, to James Hood and John Keith, both present prisoners in the Castle of Edinburgh, Andrew Sommerville, John Buchanan, and James Robertson, all now or lately prisoners in the tolbooth of Glasgow, or to one or other of them, and to other persons whose names are to the Prosecutor unknown, the said oath, or engagement, or obligation, to the said purport, binding the persons so taking the same to commit treason, as said is. And, further, you the said Andrew M'Kinley did, upon the 5th day of February, 1817, or on one or other of the days of that month, or of January immediately preceding, at a secret meeting, held at the house of John Robertson, innkeeper and stabler in Gallowgate of Glasgow, or elsewhere at Glasgow, or in the immediate vicinity thereof, wickedly, maliciously, and traiterously administer, or cause to be administered, or did aid or assist at the administering, an oath, or engagement, or obligation, in the terms above set forth, or to the same purport, to the said James Hood, James Robertson, Andrew Sommerville, and John Buchanan, as also to James Finlayson, present prisoner in the Castle of Edinburgh, or to one or other of them, and to other persons, whose names are to the Prosecutor unknown, the said oath, or engagement, or obligation, to the same purport, binding the persons taking the same to commit treason, as said is. And you the said Andrew M'Kinley having been present at a secret meeting, held for the purpose of administering, or causing to be administered, the said oath or engagement, or other purposes to the Prosecutor unknown, at the house of Alexander Hunter, changekeeper in the Old Wynd of Glasgow, on the 22d day of February, 1817, and having been there apprehended, conscious of your guilt in the premises, did assume the false name of John Brotherstone; and having been taken before Robert Hamilton, Esquire, Sheriff-depute of Lanarkshire, you did, in his presence at Glasgow, on the 28th day of February, 1817, and on the 11th day of March, 1817, emit and subscribe two several declarations; and having been taken before Daniel Hamilton, Esquire, one of the Sheriffs-substitute of Lanarkshire, you did, in his presence, at Glasgow, on the 4th day of March, 1817, emit and subscribe a declaration;

and having been taken before Hugh Kerr, Esquire, one of the Sheriffs-substitute of Lanarkshire, you did, in his presence, at Glasgow, on the 5th day of March, 1817, emit and subscribe a declaration; and having been taken before James Wilson, Esquire, Sheriffs-substitute of the county of Edinburgh, you did, in his presence, at Edinburgh, on the 18th day of March, 1817, emit and subscribe a declaration;—all which declarations, being to be used in evidence against you at your trial, will, for that purpose, be lodged in due time in the hands of the Clerk of the High Court of Justiciary, before which you are to be tried, that you may have an opportunity of seeing the same. At least, times and places foresaid, the said oath or engagement, or an oath or engagement to the same purport, binding, or purporting to bind, the person taking the same to commit treason, as said is, was wickedly, maliciously, and traitorously administered, or caused to be administered, and some person or persons did aid or assist at the administering thereof; and you the said Andrew M'Kinley are guilty thereof, actor, or art and part. All which, or part thereof, being found proven by the verdict of an Assize, before the Lord Justice-General, the Lord Justice-Clerk, and Lords Commissioners of Justiciary, you the said Andrew M'Kinley ought to be punished with the pains of law, to deter others from committing the like crimes in all time coming.

H. Home Drummond, *A. D.*

LIST OF WITNESSES.

1 Robert Hamilton, Esquire, Sheriff-depute of Lanarkshire.
2 Daniel Hamilton, Esquire, one of the Sheriffs-substitute of Lanarkshire.
3 Hugh Kerr, Esquire, one of the Sheriffs-substitute of Lanarkshire.
4 James Thomson, clerk to John Drysdale, Sheriff-clerk of Lanarkshire.
5 Matthew Burns, clerk to George Salmond, procurator-fiscal of Lanarkshire.
6 John Leslie, clerk to the said John Drysdale.
7 Joseph Reid, writer in Glasgow.
8 George Salmond, Procurator-fiscal of Lanarkshire.
9 James Wilson, Esquire, one of the Sheriffs-substitute of the county of Edinburgh.
10 Archibald Scott, Procurator-fiscal of the county of Edinburgh.

11 James Currie, writer, Sheriff-clerk's office, Edinburgh.
12 Alexander Calder, Sheriff-officer in Glasgow.
13 Alexander Hunter, changekeeper, Old Wynd of Glasgow.
14 Marion M'Laren, or M'Lachlan, now or lately servant to the said Alexander Hunter.
15 John Robertson, innkeeper and stabler, Gallowgate, Glasgow.
16 Agnes Campbell, wife of Thomas Dow, steam-boiler-maker, and smith at Girdwood and Company's foundry in Hutcheson Town, in the vicinity of Glasgow.
17 Janet Rentoul, now or lately servant to Neill Munn, innkeeper and stabler in Ingram Street, Glasgow.
18 Alison Wilson, now or lately servant to the said Neill Munn.
19 Mathew Fyfe, spirit-dealer in Wilson Street, Glasgow.
20 Jean Boyd, wife of the said Mathew Fyfe.
21 William Leggat, changekeeper in King Street, corner of Centre Street, Tradestown, in the vicinity of Glasgow.
22 John Mitchell, weaver, residing in Wilkie's Land, Charles Street, Calton of Glasgow.
23 Hugh Dickson, present prisoner in the Castle of Edinburgh.
24 Peter Gibson, present prisoner there.
25 John M'Lachlane, present prisoner there.
26 William Simpson, present prisoner there.
27 John Campbell, present prisoner there.
28 James Hood, present prisoner there.

H. Home Drummond, *A. D.*

LIST OF ASSIZE.

County of Edinburgh.

David Gray of Snipe.
John Thomson of Burnhouse.
George Jeffrey, grocer in Dalkeith.
Richard Muschet, merchant there.
5 James Mutter, farmer, Longside.
James Niblie, farmer, Easter Cowden.
David Thomson, farmer, Wester Cowden.

County of Haddington.

John Anderson of Whitheugh.
Thomas Mitchell of Westburn Mains.
10 Charles Crawford, farmer, East Fortune.

Mark Turnbull, farmer, Upper Bolton.
James Wilson, farmer, Bolton.

County of Linlithgow.

William Wilkie of Magdalens.
William Shillinglaw of Boghead.
Andrew Mitchell, farmer at Kinneil Kerse.
John Ross, farmer at Borrowstown.
John Thomson, farmer at Inveravon.

City of Edinburgh.

Richard Johnston, banker in Edinburgh.
James M'Kenzie, goldsmith there.
Robert Green, watchmaker there.
Robert Slater, dye-cutter there.
William Neilson, painter there.
James Yule, baker there.
Andrew Grierson, tailor there.
Patrick Main, painter there.
John Lauder, merchant there.
Samuel Hopperton, grocer there.
John Brown, merchant there.
Robert Mitchell, merchant there.
William Lockhart, tinsmith there.
John Sinclair, seed-merchant there.
William Scott, pewterer there.
Alexander Johnston, ironmonger there.
George Gray, baker there.
Thomas Edmonstone, ironmonger there.
William Murray, baker there.
John Smith, spirit-dealer there.
Thomas Hunter, merchant there.

Town of Leith.

John Sharp, wine-merchant in Leith.
Archibald M'Dowall, merchant there.
James Ogilvie, wine-merchant there.
Robert Strachan, merchant there.
Robert Sanderson, cooper there.
Robert Brunton, merchant there.
John Calder, grocer there.

D. Boyle.
Ad. Gillies.
Geo. Fergusson.

LORD JUSTICE CLERK.—Andrew M'Kinlay, What do you say to this indictment? Are you guilty or not guilty?

ANDREW M'KINLAY.—Not guilty.

LORD JUSTICE CLERK.—Have Counsel any objections to state to the relevancy of this Indictment?

MR. CRANSTOUN.—My Lords, It will be in the recollection of your Lordships, that a person of the name of William Edgar was lately indicted at your bar, upon a charge of having administered oaths binding the takers to commit treason, against the statute of the 52d of the King. He pleaded not guilty, and various objections were stated to the relevancy of the indictment. Your Lordships heard a debate upon the subject, and you appointed informations to be given in. But the public Prosecutor deserted the diet of that indictment, and served him with a new one.

The prisoner, Andrew M'Kinlay, now at your bar, had been indicted in terms precisely the same with Edgar. That indictment has also been withdrawn, and a new one served, which you have now before you.

Your Lordships will recollect, that among the objections stated to the relevancy of Edgar's indictment, it was pleaded, that it involved a charge of treason, and therefore was not cognizable in this form;—first, because the charge of treason was not laid in the major proposition of the indictment; and, again, because your Lordships, proceeding according to the Scotch form of trial, could not try that offence without the intervention of a grand jury, and without allowing the prisoner a peremptory challenge of the array, and other privileges competent by the law of England to persons under trial for high treason.

The indictment which your Lordships have just heard read is in terms somewhat different from that in Edgar's case which has been withdrawn; and, it is for your Lordships now to consider, if there are any objections that can be competently stated to the relevancy of the present indictment; or rather, I should say, if any one objection that could be competently stated to the last indictment, may not also be stated here.

Before I proceed to consider what I conceive to be various objections to the relevancy of this indictment, I must take the liberty to make one preliminary observation. It is this—that, in all criminal cases, where there is room for construction, every thing must be strictly interpreted in favour of the accused, and against the prosecutor. I cannot make

this observation without at once commanding the assent of every body, for this has always been recognised as a sacred principle of law; but if we look at many trials at former periods, both in our own and in the neighbouring country, we shall find, that while this maxim was granted in words, it was denied in substance, and frittered away by distinctions and refinements that rendered it nugatory, and at other times, while admitted in theory in its full extent, it was overlooked and forgotten in practice. It resembles those truths in morals, which we repeat till they cease to have any influence on our conduct. The uncertainty of human life, for instance, is always in our mouths, and we act as if we had a grant of life for a century. Thus there are maxims in law which become so familiar, that they lose all their effect.

Permit me, therefore, not only to recal the maxim to your recollection, but forgive me, if, in a few words, I enforce it. Because it appears trivial, therefore I wish to insist upon it.

The foundation of this maxim is obvious. Even in the dispensation of commutative justice, where there is a conflict between the patrimonial interests of individuals, you know, that, in common law, some cases receive a liberal, and others a strict interpretation. In some cases, you control the words of a writing by equity; and, in others, you take it according to the strict letter, though contrary to the presumed intention of parties. Why are these different rules of interpretation adopted? Merely because one plea is favourable and another the reverse; because one, for example, infers an inconvenient restriction on commerce, or the use of property, or one party is *lucro captando*, while the other is *in damno vitando*. On such slight grounds, you hold yourselves entitled to apply the one mode of construction or the other.

If that be the case in civil matters, much more must it be in those tribunals where justice is called upon not to wield the balance but the sword. There, there is no conflict or opposition between the interest of the parties at the bar. If it is for the advantage of the prisoner that there should be a strict interpretation in all cases, it is ten times more for the interest of the public Prosecutor, or rather of the community which he represents. The object of punishment is lost—it becomes highly pernicious if inflicted when a moral possibility of innocence remains, either because the charge is ambiguously expressed, or the evidence in support of it is inconclusive. It is a sacred rule, that every one avenue should be left open to which innocence may have occasion to resort, though by it guilt may be enabled to escape. *Si errandum*

est sine jure absolvere quam per injuriam condemnare est sanctius; nam inillo error, in hoc facinus.

Accordingly, from the first dawn of jurisprudence, it will be found in every criminal code. It forms part of the 155 law of the title *de Regulis Juris. In poenalibus causis benignius interpretandum*—a treatise which, I will venture to say, is the greatest body of concentrated wisdom on the subject of jurisprudence to be found in any uninspired work.

This rule extends to the law or statute on which an accusation is laid—to the indictment on which the trial proceeds—to the evidence led against the prisoner—to the verdict returned—and, above all, if the *corpus delicti* consists in the uttering of words, it extends to the construction of those words.

This principle of construction has been acknowledged again and again by the Legislature, more particularly in the law of treason, which you are now called upon to administer; or, at least, which bears directly upon the indictment, the relevancy of which you are now to try. You know there was an act passed in England in the reign of Elizabeth against clipping or defacing the coin. It is the 3d of Elizabeth, cap. 11, which prohibits the operations of clipping, wasting, rounding, or filing. But that statute was found not to apply to any other mode of lessening the value of the coin, though precisely the same in effect; and, accordingly, the statute of the 18th of Elizabeth, cap. 1, was made against impairing, diminishing, falsifying, scaling, and lightening, and it was made on this remarkable preamble:—"Because the same law, "(5th Elizabeth) being penal, ought to be taken and ex- "pounded strictly according to the words thereof, and the "like offences not by any equity to receive the like punish- "ment or pains." Here then is a declaration of the Legislature itself, in a statute relative to high treason, explaining the manner in which such statutes ought to be construed.

I may likewise call your attention to what the author, from whom I have borrowed this remark, has said upon the construction of penal statutes. Sir William Blackstone, Vol. I. p. 88., observes, "Penal statutes must be construed strictly. "Thus the statute of 1. Edward VI. c. 12. having enacted, "that those who are convicted of stealing *horses* should not "have the benefit of clergy; the Judges conceived that this "did not extend to him that should steal but one *horse*, and "therefore procured a new act for that purpose in the follow- "ing year. And, to come nearer our own times, by the sta- "tute 14 Geo. II. c. 6., stealing sheep, *or other cattle*, was "made felony without benefit of clergy. But these general "words, "or other cattle," being looked upon as much too

" loose to create a capital offence, the act was held to extend " to nothing but mere sheep. And, therefore, in the next " Sessions, it was found necessary to make another statute " 15 Geo. II. c. 34., extending the former to bulls, cows, oxen, " steers, bullocks, heifers, calves, and lambs, by name."

Thus, your Lordships will observe, that even where words sufficiently appropriate in their ordinary sense were employed, yet if it was possible to take the offender out of the operation of the statute by any construction however rigorous, that construction, though not consistent with the probable, I may say the manifest intention of the Legislature, was allowed. I cannot give a more striking instance of the application of the rule which I am endeavouring to enforce, than this which is borrowed from the law of England. I shall afterwards call your attention to some determinations in our own law to the same effect.

In the present instance it is obvious, that the application of the principle of strict construction is imperatively required. *First*, because this is a penal case; *Secondly*, because it is a case where the highest penalty of the law may be inflicted; *Thirdly*, because the crime charged consists in the use of words, upon the construction of which the prisoner's fate depends; and, *lastly*, because these words are stated to have been used not by a person well educated, and critically acquainted with language, but by one who is in the lowest situation of life, and who must be presumed to be totally ignorant of the force and delicacy of terms.

Having made these observations, let me call your attention to the major proposition of this indictment. It sets forth, that, " by an act passed in the fifty-second year of his present " Majesty's reign, entitled, " An act to render more effectual " an Act passed in the thirty-seventh year of his present Ma- " jesty, for preventing the Administering or Taking Unlaw- " ful Oaths," it is *inter alia* enacted, " That every person " who shall, in any manner or form whatsoever, administer, " or cause to be administered, or be aiding or assisting at the " administering, of an oath or engagement, purporting or in- " tending to bind the person taking the same to commit any " treason or murder, or any felony punishable by law with " death, shall, on conviction thereof by due course of law, be " adjudged guilty of felony, and suffer death as a felon, with- " out benefit of clergy." And then follow other two sections of the same act, which it is unnecessary for me to read.

With regard to this proposition, I am ready to admit, that, in point of form, it is correct, by founding on and quoting the words of the statute on which the accusation is

laid. It does not appear to me, that there is much room for interpretation here. If there be room for any, it is as to the meaning of the words "purporting and intending," that is, whether the Legislature means the intention of the party administering or taking the oath, or the intendment of the oath itself. I apprehend it must be clear to you, without my saying any thing upon the subject, that the import of the word "intending," is, that it must be an oath, the *intendment* of which is to bind to the commission of the crime, and that it is of no consequence whether the person who administers had criminal intentions or not, provided the intendment of the oath is not criminal. If there be an ambiguity in the use of the term, the prisoner must have his choice in which sense it shall be taken. But there is no ambiguity. It could not have been the meaning of the Legislature to punish the secret intentions of a person administering such an oath; for unless that intention had been communicated, the offence in contemplation, namely, the imposition of the unlawful obligation, could not have been committed. If the words of the oath do not express the unlawful obligation, no person could conceive that it was undertaken; and if it was not undertaken, a capital punishment could not be meant to be inflicted on the person who intended to administer, but who did not administer an oath of that import.

On this subject, I may content myself, by recalling to your recollection Mr. Clerk's observations upon the term in question. In the act of the 37th of the King, it was the object of the Legislature to punish a misdemeanour, and therefore the words employed are different from those of the statute on which the present indictment is founded. The words, in the 37th of the King, are "purporting or *intended*" to bind, the passive, instead of the active participle being used. Observe the difference of the phraseology. The term employed here is "intending," not "intended;" it relates to an oath having the intendment to bind to the commission of the crime. And, as I have already remarked, it is plain that unless that interpretation was meant by the Legislature, the punishment which I have mentioned would not have been inflicted,—for where would have been the offence, if the administrator did not by words communicate with the party taking the oath, in such a manner that the taker should have a sense that such an obligation was imposed? It is needless for me to insist more upon this subject; for, in Edgar's case, Mr. Solicitor-General admitted, it was the purport or expression of the words which the Legislature had in view; and, accordingly, the oath is recited *verbatim*

in this indictment, and the subsumption is, that the words cited purport the obligation.

I have but a single observation more to offer on this major proposition. The oath described is one "purporting or "intending to bind the person taking the same to commit *any* "treason." It is not treason in general, but any treason; the word being disjunctive, and referring to any one of the different treasons known in law. I shall recur to this afterwards.

Let us see next what is the minor proposition of this indictment:—"Yet true it is and of verity, that you the said An- "drew M'Kinlay are guilty of the said crimes, or of one or "more of them, actor, or art and part: In so far as you, the "said Andrew M'Kinlay did, at secret meetings, and on "other occasions, at Glasgow, and in the vicinity thereof, in "the course of the months of November and December, 1816, "and January and February, 1817, wickedly, maliciously, "and traitorously administer, or cause to be administered, or "did aid or assist at the administering, to a great number of "persons, to the amount of several hundreds, an oath or "engagement, or an obligation in the nature of an oath, bind- "ing or purporting, or intending to bind, the persons taking "the same to commit treason."

Your Lordships will recollect the objection which we stated to the former indictment, and which you thought deserving of consideration. It was, that the indictment involved a charge of treason. Now, I ask, does not this indictment involve the very same charge, when it sets forth, that the oath was wickedly, feloniously, and *traitorously* administered. If it were set forth, that a person had been guilty of carrying off an article feloniously, and a verdict was found accordingly, it would unquestionably be a conviction of felony. For the same reason a verdict of guilty, in this case, would be a conviction of treason. The very same objection, therefore, which occurred to the former indictment, on this ground, occurs here also. It is true, that the narrative of the former indictment was fuller; it detailed a number of circumstances respecting the treason alleged to have been committed. But it was not on the narrative that our objection rested, for if that had been the case, the Prosecutor might have given up the narrative as matter of explanation only, which he was not bound to prove, and the defect of his libel would have been cured. The objection there, as in this case, rested upon the circumstance, that treason was a substantive part of the charge in the minor proposition, which could not be separated from it, and must therefore necessarily go to proof.

If the prisoner was convicted under this libel, he would be convicted necessarily of treason,—without the presentment of a grand jury,—without the benefit of a peremptory challenge,—without any one privilege which the law of England, as contradistinguished from our common law, in criminal matters, confers on the accused.

It will farther be attended to, that this is not one of those cases in which the Lord Advocate can alter his charge after the prisoner has pleaded. If a person be accused of murder, his Lordship may restrict the libel to culpable homicide, and the jury may convict for that offence, though culpable homicide is not mentioned in the indictment. But that proceeds upon the ground that the one crime is of the same species and denomination as the other. Where the crimes are generically different, it is impossible to substitute the one for the other. Thus, in 1663, in the case of Graham, on a charge of theft, the jury brought in a verdict of reset of theft; but it was found that no sentence could pass on that verdict, because reset of theft is a crime radically different from theft. The same thing happened in the case of Charles Stewart, in 1800. Here the public Prosecutor has charged the prisoner with treason, and therefore he cannot alter his libel into a charge of felony; for, if that were the case, the prisoner, as Sir George Mackenzie observes, might come to the bar as unprepared to defend himself, as if he had never been served with an indictment at all. In like manner, Peddie was tried at the circuit at Perth alternatively for a rape, and an assault with intent to ravish; the jury found him guilty of assault only; and the Court of Justiciary here, to whom the case was remitted, decided that no punishment could pass upon that verdict. 4. Hume, p. 308.

If your Lordships were of opinion that this point required to be argued upon informations in Edgar's case, there is the same necessity for informations here. For what reason the public prosecutor has thought fit to desert the former indictments, and to serve new ones, containing the very same defect, I cannot divine. Of one thing I am certain, that the same defect does exist, and that the mere omission of the narrative or preamble, cannot in the smallest degree change the substance of the charge.

We come now to the consideration of the words of this oath, which we are told purports or intends to bind the persons taking it to commit felony. There are four clauses in this oath, as to each of which, separately, I shall beg to make a few observations. But, before doing so, let me again entreat you to keep in mind, and to apply the principles with which

I set out. You have seen how statutes were interpreted, though composed by all the wisdom of Parliament, and when it must be presumable that the legislature knew the force of the words which they employed. But here you have men in the lowest situation of life, using words, of the force of which they might not be aware; *a fortiori*, therefore, must you construe these words with the utmost latitude in favour of the prisoner, and the utmost strictness against the prosecutor.

I formerly gave some illustrations upon this subject from the law of England; permit me now to add one or two from our own law. There is a case mentioned by Mr. Hume, in which a person of the name of Janet Ramsay, when precognosced, emitted a declaration confessing the crime laid to her charge. When brought to trial, she pleaded Not Guilty; but, besides other satisfactory evidence, her declaration was laid before the jury, who returned a verdict, finding her guilty "in terms of her confession," meaning undoubtedly the declaration which she emitted when precognosced. Yet you found that no sentence could pass upon that verdict, because the prisoner had not confessed the crime at the Bar; and an extrajudicial declaration of guilt, is not, technically speaking, a confession.

But, take a case more nearly resembling the present. When a person is accused of perjury, the prosecutor must establish that the oath sworn is contrary to the truth; and it is the province of the Court, in judging of the relevancy of the indictment, to determine whether the oath is reconcileable to the truth or not. Now, I entreat your Lordships to observe how strictly the Court has been in use to construe the words of an oath in favour of a prisoner, attempting, by every possible means, to remove the inconsistency; and, if it can be removed, the libel is held not to be relevant, and the prisoner cannot go to trial upon it. In support of this observation, I must refer to the learned author, so often quoted, Hume, Vol. II. p. 127. "The substance of the crime, and "that which all the other particulars in the description of it "only modify and limit is, that a plain falsehood be explicitly and wilfully affirmed. For, if either there is any doubt "about the true state of the fact, or about the sense in which "the pannel's words are to be understood; or if they can in "any reasonable way be reconciled with the truth, or with an "innocent intention; or, in general, if it is not manifest and "obvious, but matter of likelihood only, and of inference and "comparison of many particulars, that he had a false and corrupt meaning, this shall save him from the accusation of "perjury. Indeed, it would be very dangerous to convict any

" one upon such constructive grounds; considering the im-
" perfection of language, and the still more imperfect use
" which so many persons have of it, and how unequal their
" degrees of intelligence in the affairs of life, and even their
" degrees of capacity for the observation of facts."

There is not one of these observations that would not apply in this case, where you have the words of an oath to construe, just as in a case of perjury. Now, observe the precedent to which Mr. Hume refers:—" This scrupulous and equita-
" ble caution was in particular observed in deciding on the
" relevancy of the libel against Archibald M'Killop. This
" man had been a witness in the trial of certain persons
" for a violent deforcement of the revenue officers, and had
" given a testimony which, in many points, was very favour-
" able to the pannels. Among other things, he had sworn
" that they addressed the revenue officers in a moderate and
" inoffensive manner, 'desiring them to walk soberly, and to
" make no disturbance.' Now, in this article, besides others,
" he was charged with perjury; inasmuch (said the libel)
" as it will be proved, that the persons accused, went violent-
" ly up to the officers, demanded their arms, and threatened
" to blow them up if they resisted. It was pleaded for
" the pannel, that the two assertions were not absolutely in-
" consistent, for that in swearing to the one sort of address
" and course of behaviour, he did not absolutely exclude the
" other, which might be used at a different period of the fray,
" and without his attending to it at the time." And the Court held " the allegation in the second article of the said in-
" dictment charged, in these words:—' That the pannel swore,
" that at the time there mentioned, the said James Macken-
" zie desired the said Alexander Cook and Alexander Thom-
" son, to walk soberly and make no disturbance,' *not relevant,*
" *and refuse to admit the same to probation.*" I do not ask of your Lordships to construe the oath in this indictment more strictly—the mere possibility of innocence induced the Court to hold, that perjury was not relevantly charged.

Let me intreat you, then, to apply the same principles to this oath, if it be necessary to apply them. I say, if necessary; for, I state, that if you were to construe it with the utmost latitude against the prisoner, with the same latitude as you would construe a last will, a marriage contract, or any other document the most favoured in law, it will not yield the sense ascribed to it by the prosecutor.

It consists of four clauses. Let us consider each of them.

The first is: " I will persevere in my endeavours to form a
" brotherhood of affection among Britons of every description,

" who are considered worthy of confidence." Is there any thing in the smallest degree *blameable*, not to say *treasonable*, in this? May not a brotherhood be formed of any set of persons, without a criminal, without a treasonable purpose? It was to be formed of persons worthy of confidence; it was to be a brotherhood of affection. It may have been intended to have been criminal, or it may have been intended to have been innocent; but there is nothing in the purport of these words which can be interpreted as *expressing* a design of forming a brotherhood for improper purposes. Upon that clause I think it unnecessary to say a word more.

Then, what is the second clause? " That I will persevere in " my endeavours to obtain for all the people in Great Britain " and Ireland, not disqualified by crimes or insanity, the elec- " tive franchise, at the age of twenty-one, with free and equal " representation, and annual parliaments." As the law stands at present, there are neither annual parliaments nor universal suffrage; but is there any impropriety in those who think they would be for the advantage of the Constitution, to endeavour to obtain them, provided they do so according to law? It is impossible for a moment to doubt that it is lawful so to do. There are those who think, that an alteration of this kind—I mean the adoption of annual parliaments, and universal suffrage—would be a fundamental alteration of the constitution of Great Britain; but, you know that it is laid down by the best authorities, that there is no law so fundamental that it may not be innovated—no principle so fixed that it may not be changed. Parliament may new model the succession to the Crown—it may alter the religion of the country—it may alter its own constitution. Parliaments, for instance, were not always septennial. There is no doubt that annual parliaments and universal suffrage may be obtained in a legal manner, in the same manner as any other change, by a parliamentary act; and those who hold these alterations in their nature injurious to the Constitution, never doubted, notwithstanding, that they may be competently and legally introduced. In what respect is this country distinguished from every country upon the face of the earth, but that every subject of the land may approach Parliament, the fountain of absolute power—may suggest alterations on the laws of the country—and may press, by solicitation and argument, the adoption of measures which he supposes to be advantageous. It is a libel upon the constitution to say there is any crime in this clause of the oath, provided the endeavours it alludes to are lawful endeavours.

We come to the third clause, to which I call your attention more particularly, as it was a subject of much argument

in the former discussion: "I will support the name to the ut-"most of my power, either by moral or physical strength, as "the case may require." In this clause, you are, for the first time, as I conceive, called upon to exercise the power of interpretation. It is ambiguous in two respects; and surely it is not surprising that persons in the situation of those who formed this brotherhood, should have fallen into ambiguous and incorrect modes of expression.

The first ambiguity is in the use of a relative, without any means of discovering the antecedent. "I will support *the same*:" What is the same? There are three previous things mentioned, all, or any of which, may be the antecedent. How are you to choose which of these is the antecedent? If it be of importance to the prisoner, which it is not, he is entitled to choose the antecedent; and, if any one of them rendered the oath innocent, while the others inferred guilt, he would be entitled to choose that for his antecedent, and you must take the innocent interpretation. Fortunately, however, in the present instance, it is indifferent which of them you select, for they are all equally harmless. Let us try them one by one. The leading member of the sentence is, "I will persevere in my endeavours to form a brotherhood." That brotherhood may be the antecedent. It is the leading object in the sentence; after which follows an obligation to do certain things; and then comes the engagement to support *the same*, signifying, according to that construction, an engagement to support the brotherhood. That will not infer any thing criminal; and, at all events, will never infer the crime charged against the prisoner. The brotherhood might be supported many ways. When illegally attacked, it might with propriety be defended; and when legally attacked by the magistrates, the defence of it, though it might be criminal and a felony, is not treason; and, therefore, even if the oath were to support that brotherhood by illegal means, that would not be an obligation of the nature charged in the minor proposition; for there is no harm in supporting a brotherhood of affection among Britons of every description; at all events, it is not the crime of treason.

Take another view.—He says, he will endeavour to obtain "the elective franchise, at the age of twenty-one, with free and "equal representation, and annual parliaments." If you do not take the leading antecedent in the sentence, according to ordinary construction, you should take that immediately preceding the relative, namely, annual parliaments and universal suffrage. Is there any thing improper or criminal in supporting those? You can support nothing not in existence; they must be obtained before they can be supported. If, therefore, you take the first,

or if you take the last members of the sentence for the antecedent, nothing like a criminal obligation can be extracted.

Take the only other supposable antecedent, "I will perse-"vere in my *endeavours* to obtain for all the people in Great "Britain and Ireland, not disqualified by crimes or insanity, "the elective franchise, at the age of twenty-one, with free and "equal representation, and annual parliaments." Is there any thing criminal in supporting one's *endeavours* to obtain? It infers a solecism, and is contrary to the ordinary forms of speech. To support endeavours, is just to endeavour; and, therefore, if there be any choice as to these antecedents, this is the one that ought to be rejected. But, suppose these ignorant people meant, "to support their endeavours to obtain these objects," where is the illegality in that? If they supported their endeavours in a lawful manner, it is what every good subject, holding these opinions, should be inclined to do.

But, the Prosecutor observes, that the oath does not stop at supporting the endeavours, but engages to "support the same "*to the utmost of my power, either by moral or physical* "*strength, as the case may require.*" Here, it seems to be thought, that the sting of the case lies.—I ask your Lordships, when a person comes under an engagement to exert all his endeavours, or to act to the utmost of his power upon any one occasion, how that engagement should, in fairness, be construed. The construction adopted in every case is this, that he will exert his *lawful* endeavours. It is the maxim of law, as Mr. Clerk observed, when we were last here, *id tantum facere possumus, quod de jure facere possumus.* There is no obligation which a man undertakes to do, in this or any well governed country, that does not imply, if it be not expressed, that what he engages to do is lawful. You may exclude that presumption by declaring you will do it unlawfully; but, if not so excluded, it is always understood.

The observations which I have made on these three antecedents separately, apply to them all when taken together; and if none of them singly infers criminality, they will not infer it when combined.

But, it is the word *physical strength* which seems to have laid hold of the imagination of the public Prosecutor; and he seems to think that the mere use of that term necessarily implies, that a rising in arms was in contemplation, and that the persons engaging to use their endeavours to obtain these things, were to rise in rebellion to obtain them. The Lord Advocate imagines all this, merely because the term physical strength is introduced.—But I would observe, that this obligation was imposed on an individual, not upon a body; and

there was no such thing as binding him to exert his endeavours in conjunction with the endeavours of others. It was upon each, in his individual capacity, that an obligation was imposed.

But that is, comparatively speaking, of little consequence: let it be granted that it was a collective obligation, what did it import? Is it that they shall exert their physical strength in an unlawful way? No; for, according to the maxim I stated, the presumption is, that the mode was to be a lawful one. Physical strength may be exerted in twenty ways which are lawful; and therefore you are to infer it was to be lawfully exerted to obtain the objects in view.

To show the fallacy of any other construction, let us look a little into the nature of the alternative obligation to exert *moral strength*. In the last argument on this head, it was fairly admitted, that an obligation to endeavour to obtain these objects by moral strength would not have been in the smallest degree criminal, and never could have been construed to infer treason. But, you must observe, that treason may be committed in the exercise of moral, just as well as in the exercise of physical strength. For instance, an individual, in order to obtain these objects of annual parliaments and universal suffrage, so much desired by the brotherhood, might speak or write advisedly, that the present family has no right to the crown—or that Parliament, without consent of the crown, is not entitled to alter the succession; which is high treason under the 6th of Queen Anne. But, because a man binds himself to endeavour to procure annual parliaments and universal suffrage by moral strength, is he bound to commit these or any other treasons? That would be a construction so forced, that, even on the other side of the bar, it would not be listened to for a moment. Why, then, construe the obligation to exercise physical strength, so as to infer that it was to be exercised in an unlawful manner? The one interpretation is as much strained as the other. And if physical strength may be lawfully exerted, the presumption ought to be, that the lawful exertion of it was in the view of the parties. Or, supposing even that they contemplated an unlawful act, it does not necessarily follow that they contemplated an act of treason.

Physical strength might be exerted lawfully to obtain these objects, by forming this brotherhood—by collecting its members together—by defending them against unjust attacks, by going by their orders over the country, canvassing members of Parliament for their votes, and in a thousand other ways which may be easily figured. And it might be unlawfully exerted in as many ways—in resisting the magistrates coming to

disperse a meeting—in rescuing members apprehended by law—in putting members of Parliament under durance or restraint, and so forth. All these acts, however criminal, and amounting even to murder and felony, would not amount to treason. Now, because physical strength might possibly be exerted in a way to infer treason, are you therefore to conclude that that mode of its exertion was necessarily in the view of the parties.

Just reverse the case, and see how you would construe an engagement to prevent innovation. Suppose a set of gentlemen in the country—whose politics are the reverse of those of the prisoner—were to enter into an association, and bind themselves by an oath, to support septennial parliaments and the elective franchise, as now established, by moral and physical strength. It would be a bold construction to call that treason. Yet it is precisely the construction employed by the public Prosecutor in this case; for a man may compass the King's death or levy war against him in supporting septennial parliaments, as well as in endeavouring to obtain annual parliaments.

I shall call your attention to one or two instances of oaths administered every day, and see how the principle of construction contended for by the Lord Advocate would apply to them. You know, that, when a soldier is inlisted, he is attested by a magistrate, and an oath is administered, which is prescribed by the articles of war. It is in these terms: "I swear that "I will bear true allegiance to our Sovereign Lord King "George, and that I will, as in duty bound, defend him in "his person, crown, and dignity, against all his enemies; "and that so long as I shall remain in his Majesty's service, "I will duly observe and obey his Majesty's orders, and *the "orders of the generals and officers set over me by his Majesty.*"

Is that an obligation to obey an unlawful order of an officer? I apprehend it is not. You will not go nicely to work in discriminating between right and wrong where the duty of a common soldier is concerned; but where an order he receives is plainly illegal, as to assassinate or murder a man, or resist a civil magistrate, is he bound to obey that order? No. The terms of his oath extend to *all* orders, but you will apply the maxim, *id tantum facere possumus quod de jure facere possumus.* In swearing to obey all orders, the oath intends lawful orders alone. You will recollect, there was a trial before the Court of Justiciary, in a case where a soldier had, by orders from his officer, resisted a magistrate. I speak of the case of Ferguson, in 1764. He was condemned by the Court, and it would not have availed him to plead, that the oath administered to him when enlisted, bound him to obey every order,

whether lawful or unlawful. I formerly mentioned to your Lordships how the oath of abjuration imposed by government required to be construed. It binds the parties to exert all their endeavours to support the king's government and the Protestant religion. What endeavours? why lawful endeavours surely, not by committing murder or felony. Construe this oath as you construe those oaths; let the general terms receive the same qualifications in both, and it is impossible to extract a treasonable obligation.

I have said perhaps too much on this point. Let me conclude with a few observations on the last clause: "I farther "swear, that neither hopes, fears, rewards, or punishments, "shall induce me to inform on, or give evidence against, any "member or members, collectively or individually, for any act "or expression done or made in or out, in this or similar so-"cieties, under the punishment of death, to be inflicted on "me by any member or members of such societies. So help "me God."

Nobody can doubt that it was a misdemeanor to impose, or to undertake this obligation; but this is not the question at present. Your Lordships have to judge, whether this is necessarily an obligation to commit treason. This society was composed chiefly of individuals in the lowest stations of life, ignorant, and uninformed persons, who, in the course of their discussions, might have fallen into improper or seditious expressions. It was natural that the members of the society should impose an obligation not to reveal what was said, lest any of their number should be convicted of libel or sedition. But an obligation to conceal such imprudent expressions, or even not to disclose improper acts committed in the presence of a person, is not an obligation imposed on that person to be guilty of libel, or sedition, or any similar crime, far less is it an obligation upon him to be guilty of treason. It may be a misdemeanor, but it is not that crime which your Lordships are now called upon to try, by the major proposition of this indictment; and, if that be the case, it is clear, that the libel is not relevantly laid.

Take the oath, in all its parts—apply to it the ordinary rules of interpretation—take the words with the greatest rigour, or the greatest latitude, and you will never extract that sense, which it is necessary to extract from them, before you can have a relevant charge under the statute.

The Prosecutor is not satisfied with reciting the oath in his minor proposition, he gives a commentary upon it, and it remains to be considered, whether the commentary is a fair expression of the import of the oath; and, supposing that it is,

whether the oath so construed, amounts to a treasonable obligation. After reciting the oath, the libel proceeds thus: "Which oath did bind, or did purport or intend to bind, "the persons taking the same, to commit treason by ef- "fecting, by physical force, the subversion of the established go- "vernment, laws, and constitution of this kingdom, and especi- "ally by obtaining annual parliaments and universal suffrage "by unlawful and violent means." Is that a fair gloss upon the words of the oath? Do they signify what the Prosecutor says? Or are they radically and essentially of a different signification? There is not one word in the oath of an obligation to effect any thing, or to subvert any thing, if by subversion you mean aught else than a lawful endeavour to alter an existing law. The oath binds the taker, "to persevere in his "endeavours to obtain for all the people in Great Britain "and Ireland, not disqualified by crimes or insanity, the "elective franchise, at the age of twenty-one, with free and "equal representation, and annual parliaments." Nothing is said here of the government, laws, and constitution, of the kingdom; or of any laws, except those which relate to the duration of parliament, and the elective franchise. It binds the taker to subvert nothing by physical strength, not even the laws against universal suffrage and annual parliaments, and far less the established government, laws, and constitution in general. It contains no obligation to obtain annual parliaments and universal suffrage, or any thing else, by unlawful and violent means.

It binds the taker to support one of three things; or, if you will, all the three, by moral and physical strength; but this obligation must be qualified, as every such obligation is qualified, in ordinary speech, otherwise all human affairs would be thrown into confusion, and language would become the instrument of deception and error. If it be so qualified, the obligation is confessedly innocent.

It is not a gloss to substitute words of one import for words of a totally different import, and to change the meaning of a sentence by the interpolation of whole clauses which they do not contain. The subjects of this country would be in a dreadful situation indeed, if they were exposed to a capital conviction for the use of words; in construing which words the prosecutor might substitute and interpolate as he thought fit, until he found a meaning which suited his purpose, though totally different from the meaning which the words, as he himself recited them, naturally and properly bore.

I am afraid I fatigue your Lordships, in going over grounds which were stated, if not much commented on, before.

But I now come to another ground, to which I must particularly call your attention, being sensible, that the first time I had the honour of bringing it before you, it was imperfectly argued. After having given it more mature consideration, and weighed the authorities touching it, there is no one objection to this indictment on which the counsel on this side of the bar rest with more security and confidence. It is this,—that, *esto* the words of this oath import what the public prosecutor says they import, it will not make a relevant charge; for granting that the oath binds the taker to do all that the prosecutor alleges, I maintain it is not an obligation to commit treason.

Before entering on this objection, I suppose it will be conceded to me, without any argument, that, in an indictment under this statute, the prosecutor is bound to specify the treason to which he refers,—that he is bound to state it precisely, formally, and technically. If this were not the case, there is not a more ensnaring or detestable law in the criminal code, because almost any oath might be twisted into an unlawful obligation, and the prisoner would come to the bar ignorant of what he was accused, and unprepared to defend himself.

To illustrate this, suppose an indictment laid for administering an oath, binding the taker to commit felony; and, in that case, I beg leave to ask, whether the prosecutor would be required to specify the felony he had in view. There is a vast variety of felonies, some of them existing at common law, and others introduced by statute. Many of these are complicated, obscure, and undefined, depending on the construction of revenue laws, commercial regulations, and the mysteries of trades and professions; now, if the pursuer was not made aware of the felony alluded to in the indictment, it would often be impossible for him to conjecture in what the crime consisted which was laid to his charge. Thus, suppose a prisoner was indicted for administering an oath binding the taker to commit felony, because it bound him to carry away a certain quantity of corn from the place where it was deposited, and give it to a shipmaster. Here the felony in view might be theft; or it might be fraudulent bankruptcy; or it might be taking corn from a storehouse, where it was deposited for exportation, contrary to the 11th of George II.; or it might be holding correspondence with a person who had resided in France, contrary to the non-intercourse statutes. It will not be contended, that the Prosecutor might conceal into which of those felonies he meant to construe the oath, and, consequently, deprive the prisoner of all means of defending himself.

The case of treason is perfectly analogous. It is true, there are not so many treasons as felonies, but there are at least ten different treasons in the law, and the prisoner is left altogether in the dark to which of these the Lord Advocate alludes.

The statute bears, "That every person who shall, in "any manner or form whatsoever, administer, or cause to be "administered, or be aiding or assisting at the administering, "of any oath or engagement, purporting or intending to bind "the person taking the same to commit any treason," &c. The legislature here puts the term disjunctively. It does not say treason in general, but *any treason*; clearly intending, therefore, that the prosecutor should specify the particular treason which he asserts the oath bound the taker to commit. Hence, I infer, that nothing but a technical description of the treason referred to, will suffice to make a libel under the statute relevant. It is a maxim *in criminalibus non licet vagari*, and there never was a case in which the maxim was more applicable than the present.

Let us consider the treasons actually existing in the law, and try to discover to which of them it is that the prosecutor alludes in the minor proposition of this indictment. I believe you will find the attempt altogether fruitless.

The first, mentioned by Foster, Blackstone, and other writers, is compassing the King's death. It is not laid, that this oath bound to compass the King's death, nor even to commit any of the common and usual overt acts which are considered as evidence of compassing the King's death—for example, to murder the King, or to put him in durance. I shall have occasion, by and by, to direct your attention to the case, that an overt act had been charged, that you may consider whether that would have rendered the indictment relevant. At present I am asking, whether the prosecutor asserts that the oath bound the taker to commit that species of treason?—Unquestionably he does not.

The second treason is, to violate the Queen, or the King's eldest daughter. It will not be pretended, that this treason was in view.

The third is to levy war against the King in his realm. The Prosecutor does not assert that that obligation was imposed, as will be evident from the following considerations. To constitute this treason two things are necessary: 1*st*, That war shall be levied: 2*d*, That it shall be levied against the King; or, what is held equivalent, that it shall be levied for a public purpose, as destroying all inclosures, and so forth.

Was this an oath to levy war? The old writers held, that war could not be levied, unless the persons engaged to levy it

were arrayed *modo guerrino;* unless they were assembled with "all the pomp and circumstance of war." The law is so laid down by Sir Matthew Hale. I am aware, there has been a relaxation in the law since that period; and that it is not necessary that the persons shall be so armed: but there must be a rising or insurrection of a multitude; and a few individuals assembled, armed or unarmed, is not levying war.

Sir Michael Foster corrects the old doctrine as laid down by Sir Matthew Hale, page 208, first folio edition: "Lord "Chief Justice Hale, speaking of such unlawful assemblies as "may amount to a levying of war within the 25th Edward III. "taketh a difference between those insurrections which have "carried the appearance of an army formed under leaders, and "provided with military weapons, and with drums, colours, "&c. and those other disorderly tumultuous assemblies which "have been drawn together, and conducted to purposes mani-"festly unlawful, but without any of the ordinary shew and "apparatus of war before mentioned."

"I do not think any great stress can be laid on that distinc-"tion. It is true, that in case of levying war, the indictments "generally charge, that the defendants were armed and array-"ed in a warlike manner; and, where the case would admit of "it, the other circumstances of swords, guns, drums, colours, "&c. have been added. But I think the merits of the case "have never turned singly on any of these circumstances."

"In the cases of *Damaree* and *Purchase*, which are the last "*printed* cases that have come in judgment on the point of "constructive levying war; there was nothing *given in evi-"dence* of the usual pageantry of war, no military weapons, no "banners or drums, nor any regular consultation previous to "the rising. And yet the want of those circumstances weigh-"ed nothing with the Court, though the prisoner's council in-"sisted much on that matter. *The number of the insurgents "supplied the want of military weapons;* and they were pro-"vided with axes, crows, and other tools of the like nature, "proper for the mischief they intended to effect.

——*Furor arma ministrat.*

"'SECT. I. The true criterion therefore in all these cases "is, *quo animo* did the *parties assemble*. For if the assem-"bly be upon some private quarrel, or to take revenge of *par-"ticular* persons, the statute of treasons hath already deter-"mined that point in favour of the subject."

And afterwards; "2dly, The words of the first clause "descriptive of the offence, 'if any man ride armed openly, or "secretly, with men of arms,' did in the language in those "times mean nothing less *than the assembling bodies of men,*

" *friends, tenants, or dependants, armed and arrayed in a war-*
" *like manner,* in order to effect some purpose or other by dint
" of numbers and superior strength. And yet those assem-
" blies so armed and arrayed, if drawn together for purposes of
" a private nature, were not deemed treasonable."

Again, " SECT. II. Upon the same principle, and within
" the reason and equity of the statute, *risings* to maintain a
" private claim of right, or to destroy particular inclosures," and so forth.

" And upon the same principle, and within the same equity
" of the statute, I think it was very rightly held by five of the
" Judges, that a *rising* of the weavers in and about *London* to
" destroy all engine-looms, &c."

So he goes on to the end of the chapter, stating, that though warlike apparatus is not necessary, there must be a rising in order that the multitude may compensate for the want of regular array.

The second requisite is, that the insurrection shall take place in order to accomplish a public object. It is no levying of war, if one nobleman rise against another, to burn his house or destroy his inclosures, for these are private, not public objects.

There was a case referred to when we were last here, I mean that of Lord George Gordon. There, the question was not whether it was necessary there should be an insurrection to constitute the levying of war, but whether an insurrection, which had confessedly taken place, was for a public purpose. It was not upon the first, but upon the second requisite, that the doubt arose. It was contended, that the purpose being to compel Parliament to repeal a statute, was not a public purpose; and Lord Mansfield, in an able speech, says,—
" The prisoner at the bar is indicted for that species of
" high treason which is called levying war against the
" King; and, therefore, it is necessary you should first
" be informed what is in law levying war against the
" King, so as to constitute the crime of high treason, within
" the statute of Edward III., and, perhaps, according
" to the legal signification of the term, before that statute.
" There are two kinds of levying war:—one against the
" person of the King; to imprison, to dethrone, or to kill
" him; or to make him change measures, or remove counsel-
" lors;—the other, which is said to be levied against the ma-
" jesty of the King, or, in other words, against him in his regal
" capacity; *as when a multitude rise and assemble to attain by*
" *force and violence, any object of a general public nature; that*
" *is levying war against the majesty of the King;* and most
" reasonably so held, because it tends to dissolve all the bonds

" of society, to destroy property, and to overturn government;
" and, by force of arms, to restrain the King from reigning
" according to law."

" Though the form of an indictment for this species of trea-
" son mentions drums, trumpets, arms, swords, fifes, and guns,
" yet none of these circumstances are essential. The ques-
" tion always is, whether the intent is, by force and violence,
" to attain an object of a general and public nature, by any
" instruments, *or by dint of their numbers*. Whoever in-
" cites, advises, encourages, or is any way aiding to *such a*
" *multitude so assembled with such intent*, though he does not
" personally appear among them, or with his own hands com-
" mit any violence whatsoever, yet he is equally a principal
" with those who act, and guilty of high treason."

If you will go on to the end of the learned Judge's speech, you will find the question was, whether the purpose of the insurrection was a public one, and, consequently, whether the war levied was against the King or not.

But there is nothing in the oath here, even according to the prosecutor's interpretation, which binds the taker to levy war at all—to rise in arms—or to assemble tumultuously for the purpose of obtaining any object, either public or private.

There are other four treasons—adhering to the King's enemies—counterfeiting the great and privy seals—counterfeiting the coin—and slaying the Chancellor and other Judges in the execution of their office. These may be passed over in silence, for it will not be pretended that the oath alludes to them. Neither can it allude to the treasons relative to Papists—to the debasement of the coin—or the obstruction of the Protestant succession.

Then there is a treason which was introduced by the 36th of George III. By that act it is made treason to conspire to levy war for certain purposes. The statute says, that " if any per-
" son or persons whatsoever, shall, within the realm or without,
" compass, imagine, invent, devise, or intend death, or de-
" struction, or any bodily harm, tending to death or destruc-
" tion, maiming or wounding, imprisonment or restraint, of
" the person of the same our sovereign lord the King, his heirs
" and successors; or to deprive or depose him or them from the
" style, honour, or kingly name of the imperial crown of this
" realm, or of any other of his Majesty's dominions or countries;
" or to levy war against his Majesty, his heirs and successors,
" within this realm, in order, by force or constraint, to compel
" him or them to change his or their measures or counsels, or in
" order to put any force or constraint upon, or intimidate or over-
" awe both Houses, or either House of Parliament; or to move

" or stir any foreigner or stranger with force to invade this " realm, or any other of his Majesty's dominions or countries, " under the obeisance of his Majesty, his heirs and successors; " and such compassings, imaginations, inventions, devices, or " intentions, or any of them, shall express, utter, or declare, " by publishing any printing or writing, or by any overt act " or deed; being legally convicted thereof, upon the oaths of " two lawful and credible witnesses, upon trial, or otherwise " convicted or attainted by due course of law, then every such " person or persons so, as aforesaid, offending, shall be deem- " ed, declared, and adjudged to be a traitor and traitors, and " shall suffer pains of death, and also lose and forfeit as in cas- " es of high treason."

We may lay out of view what is enacted as to devices directed against the King's person, or attempts to depose him. The only part of the statute to which the prosecutor can allude, is that which relates to a compulsive change of the King's measures; or to the intimidation of the Houses of Parliament. But your Lordships will observe, that it is not declared treason by the statute, to alter the King's counsels by compulsion, or to intimidate the Parliament, but *to levy war* for either of these purposes. Now, this indictment does not set forth that the oath libelled on contained an obligation to *levy war* for these or for any other purposes.

But the Lord Advocate seemed to hint, on a former occasion, that it was sufficient to render an indictment under the statute libelled on relevant, if he set forth that the oath administered contained an obligation to perform an act, which the jury should hold an overt act of treason, although the indictment did not specify what the treason was of which it was an overt act. For example, he said that the indictment here set forth, that the oath bound the taker to subvert the government by physical strength, and, in particular, to obtain annual parliaments and universal suffrage, by unlawful means; and those acts being overt acts of treason, it followed, that the charge in the indictment was accurately laid. But I ask your Lordships, if this doctrine be well founded? Is it sufficient, under the statute, to libel that an oath was administered, binding the party, to do what? Not to commit treason, but to do an act which the jury shall discover to be an overt act of treason. An overt act of treason is that which convinces a jury that treason has been committed; but it is no more treason in the eye of law, than the evidence of a crime is the crime itself. If the charge of an overt act of treason were equivalent to the specific charge of treason itself, then, instead of the ten or twelve treasons which I have enumerated,

there would be thousands of treasons in the law, because there are a thousand acts which may amount to evidence that the crime was perpetrated. This would be to let in the whole host of constructive treasons, which were abolished by the statute of Edward III. No oath could then be administered, which might not, *per se*, furnish a relevant charge under the 52d of the King; for the prosecutor would be at liberty to say, that although no particular treason was specified in the libel, the jury would discover that an overt act of some treason or another, fell under the obligation contained in it. This would be replacing the law in exactly the same situation in which it was in England, previous to the statute of Edward III.; and in which it was in Scotland, previous to the union. What was the defect in the treason law of those periods? It was this, that the prosecutor charged the accused with meditating or performing an act, such as subverting the constitution, altering fundamental laws, and so forth, which he thought fit to denominate treason; and thus, almost any act might be construed into treason. These constructive treasons were abolished, and a strict and technical definition of the crime substituted in their room; and, unless a person is accused of a treason so defined, the accusation is good for nothing. The prosecutor must specify overt acts, but it will not do to specify them alone; he must farther say what the particular treason is which he means to prove by them. In like manner, in this case, the Prosecutor must say not merely that the oath libelled on bound the taker to commit an overt act of treason, but what the particular treason was which it bound him to commit. If it is not a relevant charge of treason to assert that a man conspired to subvert the constitution by physical force, neither can it be a relevant charge under this statute that he administered an oath binding the taker to subvert the constitution by physical force. The person who administered the oath cannot be dealt with more harshly than the traitor himself. If constructive treasons are abolished as to the one, they must be abolished as to the other also.—The law must be consistent with itself.

I need scarcely refer your Lordships to historical illustration in support of what I have said on the law of treason. You will remember during the feeble and abject government of Richard II. that certain questions were put to the Judges, upon which they delivered answers. One of them was this. A statute had been made which had been supposed to be a subversion of the fundamental law of the kingdom, and an encroachment on the royal power; and a question was put, by command of the King, "what punishment they deserved that

" compelled the King to the making of that statute? Where-
" unto the Judges gave answer, that they should suffer as trai-
" tors." There were other eight answers that do not bear on the present question. No body will deny, that to compel the King to consent to a statute, may be an overt act of treason. To put him under constraint, is a common overt act of treason. But the Judges, without regard to the distinction which I have adverted to, and confounding what may or may not be an act of treason according to circumstances; in other words, what may or may not be evidence of treason, with the crime itself, they pronounced that the persons who compelled the King to make an improper statute were guilty of treason. Now I will read what Sir Matthew Hale, (vol. 1. p. 84.) says, with regard to the answer so given by those Judges: " The
" King called together the two Chief Justices, and divers
" others of the Judges, and propounded divers questions
" touching the proceeding in that Parliament, and the ob-
" taining of that commission; and they gave many liberal an-
" swers, and among the rest,' " Qualem pœnam merentur,
" qui compulerunt sive arctarunt regem ad consentiendum
" confectioni dictorum statuti, ordinationis, et commissionis?
" Ad quam questionem unanimiter responderunt, quod sunt,
" ut proditores, merito puniendi: Item qualiter sunt illi
" puniendi, qui impediverunt regem, quo minus poterat ex-
" ercere, quæ ad regalia et prærogativam suam pertinuerunt?
" Unanimiter etiam responderunt, quod sunt, ut proditores,
" etiam puniendi,' with divers other questions, and answers
" to the like purpose." That is the very answer I read from the state trials. You see what he says, " This extravagant
" as well as extrajudicial declaration of treason, by these Judges,
" gave presently an universal offence to the kingdom; for pre-
" sently it bred a great insecurity to all persons; and in the
" next parliament *crastino purificationis* 11th R. 2. there
" were divers appeals of treasons, by certain Lords appellors,
" wherein many were convict of high treason, under general
" words of *accroaching royal power*, *subverting the realm*,
" &c.: and among the rest, those very judges that thus
" liberally and arbitrarily expounded treason in answer to the
" King's questions, were, for that very cause, adjudged
" guilty of high treason, and had judgment to be hanged,
" drawn and quartered, though the execution was spared;
" and they, having led the way, by an arbitrary construction
" of treason not within the statute, they fell under the same
" fate by the like arbitrary construction of the crime of trea-
" son." And he adds again,

"Now, although the crime of high treason is the greatest "crime against faith, duty, and human society, and brings "with it the greatest and most fatal dangers to the govern- "ment, peace, and happiness of a kingdom, or state, and "therefore is deservedly branded with the highest ignominy, "and subjected to the greatest penalties that the law can in- "flict; yet, by these instances, and more of this kind that "might be given, it appears, 1. How necessary it was, that "there should be some fixed and settled boundary for this "great crime of treason, and of what great importance the "statute of 25th E. 3. was, in order to that end. 2. How dan- "gerous it is to depart from the letter of that statute, and to "multiply and enhance crimes into treason by ambiguous "and general words, as *accroaching of royal power*, *subverting "of fundamental laws*, and the like; and 3. How dangerous "it is, by construction and analogy, to make treasons, where "the letter of the law has not done it; for such a method "admits of no limits or bounds, but runs as far as the wit "and invention of accusers, and the odiousness and detestation "of persons accused will carry men."

The venerable author here declares, that all accusations of this kind, such as encroaching on the royal power, or subverting the fundamental laws of the realm, are too vague as charges of treason; and that the answer which those judges gave is worthy of the highest reprobation, and was given in opposition to the statute of Edward III. He never speaks upon the subject, throughout the whole course of his work, without animadverting, in terms equally severe, on the conduct of those judges. At page 266, he says, that "al- "though the statutes of Richard are repealed as to the new "treasons which they introduced, yet still they are of force "and efficacy to the damning of those extravagant opinions "and declarations." Now I entreat your Lordships to turn to the present indictment, and see what it is that the public prosecutor calls upon *you* to declare to be treason in this case. One would suppose he had purposely used the very terms which Sir Matthew Hale has branded with his stigma. "Which oath, or engagement, or obligation, to the foregoing "purport, did bind, or did purport or intend to bind the per- "sons taking the same, to commit treason, by effecting by "physical force, the subversion of the established government, "laws, and constitution of this kingdom."

Are you not here called upon to declare, that subverting the realm, or the fundamental laws of the realm, is treason? Are you not called upon to enhance an act into treason by ambiguous and general words. When his Lordship requires you

to find this indictment relevant, he requires you to make the very same answer which the English judges did in the reign of Richard II. and which Sir Matthew Hale so strongly reprobates—an answer, on account of which one of those unhappy judges was dragged to the gibbet, and all of them held up to the execration of posterity.

I may illustrate this proposition in another way more familiar to your Lordships, by referring to our own, instead of the English law. Mr. Hume, Vol. III. p. 310. expresses himself in the following words:—"I have said in the second "place that a libel is not good, unless it give such an ac- "count of the criminal deed as may distinguish this particu- "lar charge from all other instances of the same sort of crime, "and thus bring the pannel to the bar, sufficiently informed of "that whereof he is accused; otherwise the purpose would "not be fulfilled, which the law entertains, in ordering the "pannel to be served with a copy of his libel, and allowing him "so many days to make preparation for his defence. In con- "firmation of this rule, M'Kenzie has rightly appealed to that "statute respecting the crime of forestalling, which allows an "offender in this sort to be indicted, generally, as known and "reputed to be a common forestaller, without any more special "detail of his transgression; thus plainly implying, that "such a course of accusation is contrary to the tenor of our "common law, and is justifiable only under the authority of a "positive enactment. It is certain, accordingly, with respect "to any article of dittay, which is stated quite at large, with- "out any reasonable specification of the time, place, or man- "ner of the thing which is alleged to have been done, that "the pannel cannot be put on his defence against it."

Now I should like to know what species of treason—in the words of Mr. Hume, "what sort of the crime," the Lord Advocate had in view, under the description of effecting, by physical force, the subversion of the established government.

To obtain annual parliaments and universal suffrage by violent and unlawful means, may be overt acts of compassing the King's death, or of levying war, or of conspiring to levy war, to obtain an alteration of the law. If the public prosecutor may have in view three different treasons, distinct from each other, how is it possible, according to Mr. Hume, that this can be a relevant indictment, when it does not specify which of them he had in view? This argument, you will observe, is distinct from the other. Formerly I argued, that to libel an overt act of treason, is not to libel treason; now I contend, in addition to that plea, that to libel treason is insufficient, unless the sort or species of the treason

is also laid. And whatever holds with regard to a libel for treason, necessarily holds with regard to a libel for administering an oath binding to commit treason.

But there is one consideration more, to shew you the extreme danger of admitting charges of constructive treason; and it is this, that the facts here represented as overt acts of treason, do not in reality amount to treason, or afford any evidence of the existence of treason. In truth, the law, the constitution, and the government, may be subverted by violent means, and yet no treason be committed. It is no matter that the case is not very probable; it is quite sufficient for my present purpose, that it is merely possible. Suppose the case, that an individual robs the bank, and bribes Parliament to make the government despotic, where is the lawyer who will affirm this to be treason under the 25th Edward III.? Suppose that an individual compels a judge, by violence, to grant criminal warrants for arresting illegally certain Members of Parliament, in consequence of which they are prevented from voting against universal suffrage and annual parliaments. This is not levying war to put constraint upon Parliament, under the 36th of the King; for the act of an unarmed individual, as we shall suppose him, cannot be the levying of war. Yet here the constitution is overturned by violent and unlawful means, without the commission of treason. These are examples to show the danger of departing from the salutary principle of the law of England, that where treason is charged, it shall be accurately specified. If you depart from that principle, and find the present indictment relevant, you overturn the whole law of treason—you let in all the constructive treason which existed before the 25th of Edward III. and the security which the subjects of this kingdom derived from that excellent statute will be destroyed.

One circumstance I had nearly forgot to mention. It is only another instance of the extreme inaccuracy with which this indictment is framed. It was pointed out the last time we were before your Lordships; but the public prosecutor has not corrected the error. The terms of the oath, as he has stated it, in the third clause, are, "and that I will support the "same to the utmost of my power, either by moral or physi- "cal *strength*, as the case may require;" and yet, when he comes to mention the import of the oath, in the subsequent part of the indictment, he says the obligation was to use physical *force*. Now, you see he does not do this carelessly or unintentionally; for he repeats it after his attention had been expressly called to it by the prisoner and by your Lordships;

and his doing so is just saying he thinks himself entitled to substitute one word for another, although they are of an import materially different. If he is to be indulged with that liberty, it is in vain to talk of construction at all, for he may make any oath signify what he pleases. Strength and force are undoubtedly two different things, as was well illustrated by Mr. Clerk on a former occasion.

The grounds then, I go upon, are these. *First*, I maintain that this is an accusation of treason, which cannot be tried in the present form. *Secondly*, That the obligation contained in this oath, with the exception of a misdemeanor, does not infer any thing criminal; and that even if it did, it does not necessarily infer any thing treasonable. *Thirdly*, That the meaning which the prosecutor extracts from the oath, is not the meaning that, by any fair construction, it can bear. And *lastly*, Supposing it did bear his meaning, that the acts, which he says amount to treason, do not amount to it. The indictment is altogether erroneous; the obligation which it affirms the oath imposed, is not affirmed to be a specific treason properly defined; and, in fact, it may be no treason at all.

There is another objection to this indictment of a nature a little more subtile, and which rests on a principle of the law of England applicable to this statute. If you give leave to one of my brethren to address you on the subject, that objection may be stated to you with more effect. On a former day, your Lordships stated that it was your rule to allow several counsel for the pannel to speak in succession at the commencement of the argument on the relevancy; and it is because I am not so well qualified to do justice to this point, that I would rather devolve it on another, who is more conversant in English law. The objection rests on two or three propositions. It is well established in common law, that felony merges in treason; and when, from the evidence in a trial on a charge of felony, treason appears to have been committed, the trial cannot proceed for the felony. Now here, the conclusion of the prosecutor is, that the oath was *traitorously* administered; and the overt act refers to an oath which would in itself, if administered or taken, amount, *according to the prosecutor*, to the crime of high treason. It is no answer to say, that the statute here enacts that an oath binding to commit treason should be held to be felony; for this reason, that it is another principle of the law, that where the legislature declares a certain act to be felony, it shall be held not to have been treason before the statute. There might be many oaths binding to commit treason, which oaths might be taken without the taker actually committing treason by so swearing. An oath to levy

war for destroying stocking-frames, may not be treason, whereas other oaths binding to commit a treason, in the very act of administration or of taking, form treason of themselves. The legislature might have in view only the species of oaths, which binding to commit treason, do not, in the administrating of them, infer the commission of treason. Another rule is, that where there are two statutes relative to any matter, and the one does not repeal the other, they must be interpreted so that the one may be consistent with the other. Statutes, therefore, as to treason, which have passed since the statute of Edward III. must be construed, if possible, so as to be consistent with the latter. This limits, therefore, the statute of the 52d of the King, to those oaths only which are administered without the commission of treason at the time of administration; and, in common sense, it could not otherwise be interpreted without endangering the whole fabric of the constitution. What would be the consequence were the case otherwise? A person administering an oath, the very administration of which is treasonable, might be protected from a prosecution for treason, by an indictment being served upon him under the statute. It is plain, therefore, that this statute, in as far as treason is concerned, can only apply to oaths binding to that species of treason in which the taking of the oath is not of itself treason. These principles will be illustrated more at length to you by Mr. Grant, and supported by authorities.

It is upon all these grounds taken together, we submit, that this indictment is as objectionable as the former, and that the prisoner, therefore, should be dismissed from the bar.

Lord Justice Clerk.—Before Mr. Clerk is precluded from making any observations on the subject, I think it right to direct his attention to a circumstance which has occurred to the Court, as deserving the consideration of both parties. In reference to all the four particular charges, as to the administration of this alleged unlawful oath, this indictment concludes in these words:—"The said oath, or engagement, or "obligation, to the said purport, binding the persons taking "the same to commit treason, as said is." These are not the words used in the conclusion of that part of the indictment which follows the recital of the oath: "which oath, or engage-"ment, or obligation to the foregoing purport, did bind, or did "purport or intend to bind, the persons taking the same to "commit treason, by effecting, by physical force, the subver-"sion of the established government, laws, and constitution of "this kingdom, and especially by obtaining annual parlia-"ments and universal suffrage, by unlawful and violent means."

In the four particular instances of the administration of the oath specified in the indictment, neither "purporting," nor "intending," are mentioned, which are the words of the statute.

I think it right to bring this under the observation of the Bar. The objection was already in your Lordships' view.

Mr. GRANT.—If in a case of this extreme anxiety, my attention could be directed to any thing personal to myself, I should certainly feel under the greatest embarrassment, in addressing your Lordships, after the speech which you have just heard. I cannot, however, on the present occasion, feel the least concern for any thing that belongs to myself. Not only is this case one of great anxiety, as it involves the lives of the unfortunate men who are to be tried for the crimes which are charged in this indictment; but I regard it as one of the greatest importance in point of law. It is, so far as I know, the first case in which the Court of Justiciary in Scotland has been called upon to decide on a question of treason, according to the principles of the law of England regarding treason, which were imported (if I may use the expression) into this country immediately after the act of union between England and Scotland.

I am bound to believe that your Lordships are conversant with the English authorities upon this subject, because you are bound to administer the law according to these authorities; and, therefore, when I refer to these authorities, and when I address to your Lordships the same sort of argument which I should address to the courts elsewhere, I am aware, that not only no apology is necessary for doing so, but that it is my bounden duty so to do, because these are authorities in the law of Scotland. When I say this, I do not mean to assert so unreasonable a proposition as that it can be expected from your Lordships that you should be as intimately acquainted with the phraseology of this part of the law, and with the cases by which it is governed, as you are with the phraseology and established practice of the law of Scotland, as it applies to the cases which generally come before you.

Therefore, when I request your attention to the argument which it is my duty to state to you, I am aware that I demand of your Lordships an attention to a subject with which you cannot be so thoroughly familiar as you are with any other branch of the law which you administer; and I am also but too sensible, that I am not capable of either explaining or supporting my argument in the manner which the deep importance of the case demands.

I am bound to perform my duty in the best manner I can; but, I confess, I feel an uncommon degree of anxiety on the subject, because, having considered it with the utmost attention of which I am capable, I am satisfied, in my own mind, that I cannot fail in establishing the propositions which I have to announce, except from a want of that talent for explanation and exposition which the subject requires.

I have to lay down certain propositions; in supporting which, I hope, that though I shall have occasion to refer to several authorities, I shall not have occasion to quote them at such length as to occupy very much of your time; and I am the more disposed not to encroach upon it, as your attention must be exhausted from what you have heard, and as I have the disadvantage of addressing you after so able and luminous a speech as that which Mr. Cranstoun has just delivered.

I am first to maintain, what I think will be conceded, *that, whether this oath do or do not bind to the commission of treason, is a question of English law.*

I shall next state to your Lordships, and I think I shall satisfactorily prove to you, *that it is a maxim, in the law of England, that an act of high treason cannot be tried as a felony.*

I shall then state to your Lordships, *that this applies still more strongly to cases tried in Scotland*—for, whereas, in England, a case amounting to high treason upon the evidence, cannot be tried as a felony, and no judgment can be given upon such a case, but the person accused is entitled to be acquitted upon such a trial, although the form of trial in cases of felony do not differ so essentially from that in cases of high treason as it does in Scotland—how much more strongly must this apply in Scotland, where the whole form of your procedure in cases of treason is distinguished by a positive statute, from your forms in trials for other crimes. By a positive statute, your Lordships, sitting as you are now doing, cannot try an offence which amounts, according to the statement of the public prosecutor, to high treason, by the machinery which you are now employing—you cannot try it on the indictment of the Lord Advocate. You can try it only on the indictment of a grand jury, and by that course and form of proceeding which would be pursued by the Court of King's Bench in England.

Then, I shall submit, that this is your situation at present, *unless it can be shewn that there is any thing in this act of the 52d of the King, which has abrogated that rule of the common law, and repealed that statute;* and, I think, I shall satisfy your Lordships, *that there is nothing*

in this act of Parliament that does so abrogate the common law, or repeal that statute. There is nothing in this act from which we can infer, that it was the intention of the legislature to do either: on the contrary, it is impossible to infer from this act any such intention without the greatest absurdity; and the greatest injustice and wrong would be introduced by so doing.

If I make out these propositions, I shall succeed in shewing to your Lordships, that this is not a relevant indictment; and that it is not a relevant indictment, not only because it does not sufficiently specify and charge any treason, but because the public prosecutor is in this dilemma, that, if it does, he cannot try the offence in this shape. I desire him to take his choice of the two propositions. He cannot maintain both. Either this which the oath bound to do is charged as treason or not—it is either a relevant charge as such, or not. It will not be said it is relevant to charge it as treason without words, which in their ordinary meaning amount to a description of some treason. Then, I say, if they do not amount to a description of a treason, the libel is irrelevant, upon the grounds which my friend Mr. Cranstoun has stated. If, upon the other hand, the prosecutor says, that the specific treason is here sufficiently alleged and set forth, I desire him to say, by what law he can try this offence in this Court, by this mode of proceeding?

Without going over again the argument of my learned friend, which I should only weaken by attempting to resume it, I must, in supporting my own views of the case for the sake of the argument, suppose that he has failed in his proposition. My intention is to direct you to the other branch of the dilemma. If this indictment does imply a charge of treason, although the specific words which we say ought to be in the indictment are not used; then we ask, What sort of treason or overt act of treason do they charge? It is said, that this oath was administered to a great number of persons, to many hundreds or thousands—that it was traitorously administered to them—and bound these many hundreds of persons to commit treason, "by effecting, by physical force, the "subversion of the established government, laws, and consti-"tution of this kingdom; and especially by obtaining annual "parliaments and universal suffrage, by unlawful and violent "means." If this means any treason whatever, it can only mean *the compassing and imagining* the King's death; or the treason mentioned in the 36th of the King—levying war, in order to compel his Majesty to change his measures, or to constrain one or both houses of Parliament. Now *the com-*

passing and imagining to levy this war, is, by the act of the 36th of the King, declared to be a treason. The administering this oath, then, to give the Prosecutor his own way, would be an overt act of such compassing, or of compassing the King's death. If so, it is an overt act of treason, and cannot be tried as a felony. (I would request of you, my Lords, if I fail in any part of the argument which I am maintaining to you, to make myself intelligible, to intimate to me when I do so; for I wish to take up as little time, and to render myself as intelligible as possible.) I say it is a known rule of the law of England, that felony merges in treason—that treason drowns felony. If a person is accused of felony, and, upon the evidence, it comes out to be an overt act of treason, he must be acquitted upon that trial. He cannot, by the law of England, be convicted upon an indictment of felony, where the crime amounts to an overt act of treason.

This is a maxim in the law of England, of so ancient a date, that it is difficult to find it in the more modern authors, in other than general terms, because it is a proposition which nobody has ever ventured to dispute. If we turn to the Year-Book 31. Hen. VI. we find that the greater offence drowns the less—And this is a general maxim. For instance, trespass is extinct in felony. Suppose goods are taken, and an action of trespass is brought for them, if, upon the evidence, it appears the crime amounts to felony, the prisoner must be acquitted of the trespass, because the felony drowns the trespass—the trespass merges in the felony; and he must be acquitted of the trespass and reindicted for the felony. The Year-Book 31. Hen. VI. 15. quoted in Broke's Abridgment, *voce* trespass, page 145, says, "It was agreed that in case of a robbery, the "person robbed shall not have an action of trespass for the "goods, for the trespass is extinct in the felony, *et omne ma-*"*jus trahit ad se minus.*" Where an action of tresspass was brought by a husband for beating his wife, whereby she died; the action was found not to lye, because the crime was a felony. Huggin's case, 4. Jac. I. reported in 2. Roll's Abridgment, page 557. The policy of the law is stated by Mr. Justice Jones in Dawkes v. Coveneigh, Style's Reports, page 247. "If the par-"ty robbed may have his election, either to indict the felon, or "to have his action of trespass; this would prove very dan-"gerous." And the Chief Justice Roll gives the same reason. Many felonies would thus be smothered. By the law of England, your Lordships know, these are popular actions. Where there are popular actions, persons, from many motives, would indict for the lower offence. But the law says, No. If the evidence shew that a greater sort of offence has been

committed than that which is charged, the person tried must be acquitted on the indictment for the lesser offence, and he must be re-tried for the greater offence; and the prosecutor shall not have power to choose the lower, so as to dispense with a trial for the higher.

You are aware, my Lords, that treason, by the law of England, is not confined to what we commonly call treason. It consists of two sorts, high and petit treason. Petit treason is the murder of a husband by his wife, or a master by his servant. It has been decided, where, upon an indictment of murder, it came out to be a case of petit treason, that the person must be acquitted on that indictment, because the felony is merged in the petit treason. If this is the case as to petit treason, still more must it be so as to high treason.

I am aware that Mr. Justice Foster (as to whose opinion I shall speak presently,) doubts the authority of the case in which this was said to be determined; and, he says, that, because petit treason and murder are of the same nature, and petit treason is considered in law only as an aggravated species of murder, the murder shall not be merged in the petit treason. But what does he say he would do himself? Does he say he would direct a verdict of guilty of murder on such indictment? He says, that he would not direct an acquittal, for fear the acquittal of the petit treason might be pleaded against a new indictment for murder; but that he would discharge the jury of the indictment altogether, and would direct a re-indictment for the petit treason; for that a prisoner is entitled, when treason is charged against him, to the forms and privileges of a treason trial, his peremptory challenges, two witnesses, &c. &c. And, therefore, says the Judge, I would discharge this indictment, and I would again direct an indictment for the petit treason.

There is not a case in the books, of a verdict having been pronounced for murder when the facts amounted to petit treason. I have not found such a case alluded to; but I find the above opinion of this Judge as to the case of petit treason, which is only an aggravated species of homicide. When other authorities say, generally, a person charged with the lower crime should be acquitted, that Judge says, he would, in the case of petit treason, discharge the jury. He does not say he would desire him to be acquitted for the reason I have stated; but he says, though the two crimes are the same in substance, petit treason being an aggravated species of murder, he would not put the culprit to his trial where the prosecutor ought to have indicted for petit treason, and the prisoner is entitled to that mode of trial which is appointed for every species of treason.

All these arguments apply more strongly to high treason, than to petit treason. It is true, in high treason, the penalty is greater—the forfeitures are different. But so they are in petit treason.—In the case of a woman, the judgment in petit treason was, that she should be burned to death. But the principle is, that on account of the odiousness of the crime of high treason, the attention of government to put it down is more excited, than with regard to other crimes; and, in proportion as this operates on one side to increase the penalty, the law watches over the prisoner on the other, and gives him peculiar privileges in his trial.—And the judges hold themselves bound not to balance between the two classes of cases—they hold themselves bound to execute the law as it stands; and they think that the law has judged wisely, and that it is a great advantage to the prisoner that he should be tried according to the mode of trial appointed by the law, though it be attended with the disadvantage of greater punishment in the event of his guilt being established.

On this subject, I think, I need do nothing more than shortly cite some authorities to your Lordships. First, I shall cite a case where there was a trial for murder; and the circumstances having amounted to petit treason, the prisoner was acquitted, and a trial was ordered for the petit treason. That case is mentioned in the State Trials, vol. 6th, in the case of Cooke and Woodburne. It was a case tried in 1712, and cited by the prisoner Cooke in his defence. It was said to have occurred at the assizes; and on a conference with all the Judges, an acquittal was directed, and the culprit was re-indicted for petit treason, convicted, and executed. I need go no further to shew, that if the facts had amounted on an indictment of murder, or other felony, not to petit treason, but to high treason, an acquittal must have been directed. In a case in Dyer's Reports, page 50, *a.* a general pardon having been granted, of all treasons and felonies, with the exception of murder, it was found, that petit treason was not within the exception, but within the pardon.

I observe that the counsel for the Crown, in the case of Cooke and Woodburne, three of them very learned persons, admitted that the case cited, as decided in 1712, was good law. They admitted, that the killing a husband or a master could not be tried on an indictment of murder, because a different and distinct offence. The Chief Justice did not deny, but seemed to admit this as good law. Whether that case had been so decided, was a question of fact; and you will observe that this case of Cooke and Woodburne, in which it was cited, was tried in 1721, between eight and nine years after the opinions of

all the Judges in the case cited, were supposed to have been given; so that it is not easily conceivable, that if there had been any error in point of fact, it would not have been noticed. But, having mentioned this case, it is proper to take notice of a passage in Mr. Justice Foster's Second Discourse on Crown Law, page 326. It is as follows:

"While the case of the King against Swan, reported before, "was depending, and before the second bill was preferred, a "question was made, whether Swan could be convicted on the "indictment for murder, if it should come out in evidence that "he was servant to the deceased at the time the fact was con- "trived or committed? and, consequently, that this offence was "petit treason.

"There is a case cited, (6 State Tri. 224.) in the printed "trial of Cooke and Woodburne, which, *(if such case there ever "was)* hath, as far as the authority of it goeth, determined that "question. At the summer assizes at Dorchester, 1712, a wo- "man was indicted before Mr. Justice Eyre, for the murder of "another woman; upon evidence it appeared, that the person "murdered was her mistress, which made the crime petit "treason. The Judge directed this matter to be specially "found; and, upon conference with all the Judges, it was "holden, she ought to be acquitted upon this indictment, "as she accordingly was, and was afterwards indicted for petit "treason, and convicted and executed. This case is not to "be found in any report printed or MS. that I have met with, "or heard of; nor have I, upon strict enquiry, met with any "footsteps of such case, among the minutes of proceedings on "the crown side, in the county where the case is supposed to "have arisen, though the minutes, from 1708 to 1722, have "been carefully searched. For these reasons, and what is sug- "gested in the marginal note, I conclude that no such case ever "existed. Lord Chief Justice Hale is very full and express on "the other side of the question: That a person who is guilty of "petit treason may be indicted of murder, for it is a species of "murder; and a pardon of murder pardoneth petit treason."

I quote this passage for the purpose of shewing, that the learned Judge's only difficulty was, that petit treason was a species of murder; but he never questioned that, generally speaking, any minor offence should merge in the greater one of treason.

Then he goes on to say, "But though I am satisfied, "that the law considereth petit treason and murder as "one offence, differing only in circumstance and degree; yet, "whether it may be advisable to proceed, upon an indictment for "murder, against a person plainly appearing to be guilty of petit

"treason, is a matter that deserveth great consideration, and "probably determined the Attorney General to prefer a fresh "bill for petit treason in Swan's case; for, though the offences "are, to most purposes, considered as substantially the same, "yet, as there is some difference between them with regard to "the judgment that is to be pronounced upon a conviction, and "a very material one with regard to the trial, a person indicted for "petit treason *being entitled to a peremptory challenge of* 35, I "think, if the Prosecutor be apprised of the true state of the "case, as he may be, if he useth due diligence, he ought to "adapt the indictment to the truth of the fact.

"But if, through a mistake on the part of the prosecutor, or "through the ignorance or inattention of the officer, a bill be "preferred as for murder, and it shall come out in evidence, "that the prisoner stood in that sort of relation to the deceased "which rendereth the offence petit treason, I do not think it by "any means advisable, to direct the jury to give a verdict of "acquittal; for a person charged with a crime of so heinous a "nature ought not to have the chance given him, by the Court, "of availing himself of a plea of *autrefoits acquit*. In such a "case, I should make no sort of difficulty of discharging the jury "of that indictment, and ordering a fresh indictment for petit "treason. In this method the prisoner will have advantage of "his peremptory challenges, and the public justice will not "suffer. And, on the other hand, in case of an indictment "for petit treason, if it be proved, that the defendant killed "the deceased with such circumstances of malice as amount to "murder, but the relation of servant, &c. is not proved, I have "no sort of doubt that, on such an indictment, the defendant "may be found guilty of murder, and acquitted of the treason, "for murder is included in every charge of petit treason, *fe-* "*lonice proditorie, &c. ex malitia præcogitata* MURDRAVIT."

Upon this it may be observed, *first*, that although Judge Foster considers murder and petit treason offences of the same nature, so much so, that on an indictment for petit treason, a verdict may be found for murder, yet the greater advantages afforded by law to the prisoner on the trial—the peremptory challenge of 35 of the jury—the requiring two witnesses—and other circumstances—entitle a prisoner to be indicted for petit treason, if his offence actually amount to that description; and if it do amount to that description, and so comes out in evidence, but through mistake, or ignorance, or inattention of the prosecutor, the indictment is preferred as for murder, the prisoner is entitled to have that indictment dismissed. *Secondly*, If petit treason were to be considered as a distinct and higher species of offence, it is clear, in Judge

Foster's opinion, there would be no doubt whatever but the prisoner, under such circumstances, must be acquitted.

But there are abundant authorities to shew that this has ever been the doctrine of the law of England. Thus, in the Year-Book, 3. Henry VII. 10. where there was a question about an accessary in the harbouring one guilty of treason, (Your Lordships know, that in felony there may be accessaries by the law of England, but in treason they are all principals,) Chief Justice Hussey says, "There can be no accessary in treason; the receiving a traitor cannot be only a felony, but is treason, *et in casu ibidem.*"

Thus, Saccombe's case, 33. Henry VIII. is thus reported by Lord Chief Justice Dyer. (Dyer's Rep. 50. *a.*). "A woman had poisoned her husband, which offence is made treason about the 31st Henry VIII. (22d Henry VIII.); and by the general pardon granted by Parliament in 32d Henry VIII. this offence was pardoned. Now the son had brought an appeal against the wife; the question was, whether this appeal lies, and some thought that because the offence is made treason, it mergeth each lesser crime as the crime of murder, which was before at common law, and so the offence is not punishable as murder, but as treason, and so no appeal lies. But some were of a contrary opinion, &c. But the opinion of the Judges was, that the appeal was not maintainable." And the Reporter refers to the case 3d Henry VII. above stated.

And in Coke's Report in the cases of pardons, 29th Elizabeth, (6. Coke's Reports, 13. *b.*) it is laid down, "If murder or petit treason be made high treason; thereby the murder or petit treason is extinct, for high treason doth drown every less offence."

And Judge Foster, whose opinion that murder is not merged in petit treason I have already noticed, referring to Saccombe's case, which I have just read to your Lordships from the report of my Lord Chief Justice Dyer, and denying its authority to prove that murder is merged in petit treason, expressly founds on it as an authority to shew that all inferior felonies are merged and extinguished in the offence of high treason; and that when an offence amounts to high treason, a trial for felony is barred.

I read from the same dissertation I have already quoted. Foster's Crown Law, p. 325.

"There is a case in Dyer," says the learned Judge, "which has been thought to favour the opinion, that the crime of murder is merged in petit treason; and that a pardon of treason discharged it, notwithstanding the exception of mur-

" der; but that case proveth nothing like it. A wife, about " the 31st Henry VIII. poisoned her husband. Then came a " general pardon, by which treason was pardoned, but with an " exception of wilful murder. The heir brought an appeal of " murder against the wife, and it was adjudged that the appeal " did not lie. This case does not prove that murder is merged " in petit treason, but that both murder and petit treason were " merged and extinguished in the offence of high treason; for " at that time, by virtue of the 22d Henry VIII. all wilful " poisoning was high treason, and being so, the appeal, not be- " ing saved by the act, was barred whether the treason had " been pardoned or not."

I mention these cases to shew, that the doctrine of the law of England is, that the minor offence merges in the higher offence. I need not trouble your Lordships with further authorities upon this subject. I think what I have stated is sufficient to prove the general proposition, that, by the common law of England, all felonies merge in the offence of high treason; and that an act, amounting in its circumstance to an act of high treason, cannot, by the law of England, be tried as a felony.

But I would now beg to call your attention to this, which I think very material in the present case; that the argument is stronger in Scotland, under the act of Queen Anne, than in England under the common law. You know, that by the act of Queen Anne, which was passed after the Union, and under powers reserved in the Act of Union, 7th Anne, c. 21. the whole law of England, upon the subject of treason, has been imported into Scotland. The mode of trial has been imported—and on this subject there are two clauses to be adverted to. One is permissive to the Queen, and her heirs, who may direct a commission of oyer and terminer, to try treason in Scotland. The other is imperative, and requires your Lordships in this Court to inquire of all treasons, in the same manner as the Court of King's Bench. The third section enacts, That the " Justice Court of Scotland shall have full power and au- " thority; and *are hereby required* to inquire by the oaths " of twelve good and lawful men of the county, shire or stew- " artry where the respective courts shall sit, of all high treasons " and misprisions of high treason committed within the said " county, &c.; and thereupon to proceed, hear, and determine" (that is, they are *required* to proceed, hear, and determine) " the said offences whereof any person shall be indicted before " them, in such manner as the Court of Queen's Bench, or the " Justices of Oyer and Terminer in England, may do by the " laws of England."

So that here is a positive statute requiring this Court to proceed, and determine, according to the forms of the King's Bench in England. And, it will be conceded, that unless there are words in this act of the 52d of the King, sufficient to repeal the former enactment, it is not competent to this Court to inquire into cases of treason, in any other way than the courts of England would inquire. The words are imperative. The first clause might be interpreted, as if a trial might take place according to the ancient forms; but as to the second clause, there can be no doubt that it demands a contrary interpretation.

It were a waste of time to say a word further upon the subject, to prove to your Lordships that the rule of the common law of England as to trials for treason, and the regulations of the statute as to such trials in Scotland, are as I have stated. And it would be a still greater waste of time to attempt to show, after this statute of Queen Anne, that if any treason appear upon the evidence, you cannot proceed otherwise than according to the forms of the law of England, in cases of treason.

We come, therefore, to this simple question. Does this act of the 52d of his Majesty, on which the indictment is laid, amount to an abrogation of that rule of the common law of which I have spoken, or to a repeal of this act of Queen Anne? But it is a rule, that acts of Parliament shall be interpreted according to the rules of the common law; and my Lord Coke says, that, in particular cases, the words of an act shall be restricted in order to bring them within the rule of the common law. There is no necessity for that here, where there are two acts of parliament, and no words in the second repealing the first. If the words of the second can admit a construction leaving the former free to operate, it is necessary so to construe it. It is necessary for the crown counsel to shew, either that there are words in the 52d of the King, that repeal the act of Queen Anne, or that that act of the 52d of the King cannot receive effect without such virtual repeal—that the evil which the act was made to control and remedy, could not be controlled and remedied, unless you were to interpret the act as repealing so much of the act of Queen Anne.

If I can shew, there is nothing in this act of the 52d of the King, in its fullest and most ample interpretation—in the purposes it embraces, or in contemplation could embrace—nothing that in the least interferes with the act of Queen Anne, or the regular mode of your inquiry in any case of treason—then you are bound to give to this act of the 52d of his Majesty, no other interpretation than is consistent with the

act of Queen Anne, a statute which is fundamentally connected with the constitution of this country. No act, that is introduced for the benefit of the subject, is to be held repealed, but by the express words of some subsequent act—still less is an act to be so repealed, which is a fundamental law of the country. The law of Queen Anne is as much a part of the act of union, as if it had been inserted in it. It was passed in consequence of a power reserved by the act of union. It is an act upon which the liberty and the safety of the subjects of this country depend, in cases in which the Crown may bring them to trial for the highest state offence. It is, therefore, a fundamental part of the law of the country.

For a particular purpose, that of putting down local disturbances in England, this act, the 52d of the King, was passed; and you are called upon by the Crown counsel, to give this act, intended for this purpose, containing no words of repeal of the act of Anne, nor inconsistent with its provisions, an interpretation which is to subvert the form of trial for treason in this country. You cannot listen to the proposition for a moment.

Let us see what the 52d of the King goes to. Its preamble is: "Whereas an act, passed in the 37th year of his present "Majesty, entituled, An act for more effectually preventing "the administering or taking of unlawful oaths: And where-"as, it is expedient that more effectual provisions should be "made as to certain oaths; be it therefore enacted," &c.

The intention of the act is the same with that of the 37th of the King, and it only extends its provisions further. If you refer to the 37th of the King, Chapter 123, you will see what is the preamble of that act—You will there see the foundation of both: "Whereas divers wicked and evil-disposed persons "have of late attempted to seduce persons serving in his Ma-"jesty's forces, by sea and land, and others of his Majesty's "subjects, from their duty and allegiance to his Majesty, and "to incite them to acts of mutiny and sedition; and have en-"deavoured to give effect to their wicked and traitorous pro-"ceedings, by imposing upon the persons whom they have at-"tempted to seduce the pretended obligation of oaths unlaw-"fully administered; be it therefore enacted," &c. Both acts have the same object, and arise out of the same mischief. In the 37th of the King, this is declared to be the attempts of evil disposed persons, to reduce persons serving in the forces, and others, to mutiny and sedition. In the 52d of the King, the object and the mischief are declared to be the same as in the former act. Reference is expressly made in the preamble to that former act, and it is added, "Whereas it is expedient,

" that more effectual provisions should be made as to certain " oaths."

So that both acts proceed upon a view of the legislature, to repress the attempts of persons setting about to excite others to mutiny and sedition; and the penalty for both administering and taking, by the first act, is the same; viz. transportation. In the second act, the *administering* is death, without benefit of clergy. That is the difference between the two acts. The 52d of the King, leaves the persons *taking* the oath to the punishment of the 37th of the King; but extends the punishment of *administering* to death. And, as to the 37th of the King, are you to hold, it was the intention of the legislature to enable the courts to try those guilty of a treasonable conspiracy, as guilty of a felony, punishable with transportation? I ask, if it is possible to conceive that it was the intention of the legislature to abrogate the law of Queen Anne in *this* instance? We are to gather the intentions of the legislature from the preambles of the acts, and we may throw light on them by the history of them when passed. We see the preambles—we know the circumstances in which they were passed—we know the object and intention of the legislature in framing them. And, from these considerations, and transportation being the penalty enacted; I ask, are you to be told it was the intention of the legislature to repeal the material clause of the act of Queen Anne, as to trials for high treason? I say, that cannot be maintained for a moment by any lawyer desiring to have the reputation of common sense. It cannot be maintained, that either of the acts, that of the 37th, or of the 52d, was intended to have any such effect. According to the prosecutor's interpretation of the acts, taking an oath to murder the King, might be tried as a common felony,—as a felony to be punished by transportation only. And can an oath to commit the highest species of treason, that would have the effect of overturning the whole government—an oath to commit the most atrocious of all crimes—was it the intention of the legislature to repeal the act which considers these deeds as the highest species of treason—to repeal that act, and to make the taking of such oaths—and to make such conspiracies, a transportable felony? It cannot be maintained for a moment. Then, what are the words of this act, that the prosecutor makes such a construction of it, as to the intention of the legislature, and that without express words of repeal? I state confidently, that the statute founded on in the indictment, cannot be held to have repealed the statute as to trials of treason; and there is an end of the whole foundation of the argument, that

we can investigate this trial in the shape, and form, in which it is prosecuted.

I apprehend, that, in interpreting this act, so far as it relates to the question, whether high treason falls within it, we must again have recourse to the law of England; because, along with the introduction of the general law of treason into Scotland, we must hold, that the legislature introduced the whole law of England, as applicable where treason is in question. The question, therefore, Whether, in sound construction, this act applies to a case of treason? is a question of interpretation not merely by the law of Scotland, but by the law of England; and you will see at once, that, if there were a difference in the mode of interpretation by the laws of the two countries, the rules of interpretation in the English law, and not those in the law of Scotland, must be followed. There *is* no difference in the mode of interpretation by the two laws. But, I know that, in the law of England, it is most distinctly laid down, that subsequent acts of Parliament are to be so expounded, that they may not contradict former acts, which they do not contain express words to repeal. Thus, in Roll's Reports, an old book, in Norman French, the phraseology of which is abundantly quaint, in Vol. ii. p. 410, it is laid down as a general rule, "*Leges posteriores priores contrarias abrogant.*" But, it is said, "This cannot be by ambiguous, "and general words." And, it is added, "When two general statutes are made, and one contradicts the other," (it is meant to say, apparently contradicts,) "both, if they can "be, shall be so expounded that the one may *not* contradict the other. And a subsequent act, which can be "reconciled with the former, shall not be a repeal of it." And, in Comyn's Digest, under the word Parliament, R. 9. (Vol. 5. p. 249. of Mr. Rose's Edition,) the learned author, treating of what shall be a repeal of a statute, says, "A subsequent act which may be reconciled with a former shall not "be a repeal of it." And he refers to a passage in Lord Coke's Reports, which I shall presently read. And he says, (p. 250.) "Every statute ought to be expounded, not according to the letter, but according to the intent," referring to Roll and Plowden. And below, "The preamble is a good "means for collecting the intent." "So the ground and "cause of the making of a statute explains the intent." And, "So a statute ought to be construed according to the reason "and rule of the common law," referring again to Plowden. And, (p. 252.) "So a case, out of the mischief intended to be "remedied by a statute shall be construed, to be out of the "purview, though it be within the words of the statute," and

he quotes Lord Coke's 2d Instit. p. 386. And Lord Coke, 2d Instit. p. 301. speaking of the statute of Gloster, by which an action of waste is given "against him that "holdeth by law of England," (by courtesy) "or other-"wise for term of life," says, "Albeit, the assignee of "the tenant by the courtesy is within the letter of this law, "yet no action of waste shall be brought against the assignee, "for in construction of statutes, the reason of the common law "giveth great light; and the Judges, as much as may be, "follow the rule thereof."

I would desire of your Lordships to apply to the 52d of the King this rule, and to interpret it, as far as may be, agreeably to the rule of the common law, on the one side; and to the statute of Anne, on the other side; and see if they may subsist together.

It so happens, that this is not the first occasion (there having been many instances,) in which acts have been passed, enacting into felonies, circumstances that appear very much like overt acts of treason; and Lord Coke, in his exposition of the law of treason, has these words referred to by Hale: "that the passing an act, making an offence felony, is held "to be a judgment of Parliament that it was not treason."

I would call your Lordships' attention to an act of Parliament, which, so far as I know, has never been repealed, 3. Hen. VII. ch. 14., which recites, "Forasmuch as by "quarrels made to such as have been in great authority, "office, and of council with Kings of this realm, hath en-"sued the destruction of the Kings, and the undoing of "this realm; so as it hath appeared evidently, when com-"passing of the death of such as were of the King's true "subjects was had, the destruction of the Prince was ima-"gined thereby; and, for the most part, it hath grown, "and been occasioned by envy and malice of the King's own "household servants, as now, of late, such a thing was likely "to have ensued; and, forasmuch as, by the law of this land, "if actual deeds be not had, there is no remedy for such false "compassings, imaginations, and confederacies, had against "any Lord, or any of the King's Council, or any of the "King's great officers in his household, as steward, trea-"surer, and comptroller, and so great inconveniences might "ensue, if such ungodly demeaning should not be straitly "punished before that actual deed were done." Then it enacts, "That if any servant, admitted to be the King's ser-"vant, sworn, and his name put into the chequer-roll of his "household, &c. make any confederacies, compassings, con-"spiracies, or imaginations with any person or persons, to de-

" stroy or murder the King, or any Lord of this realm, or " other person sworn to the King's counsel, &c. that the " said offence be judged felony; and the misdoers to have " judgment and execution, as felons attainted ought to have " by the common law." Any servant of the King, entering into a conspiracy to destroy or murder the King, or any Lord of this realm, shall be judged guilty of felony, and the benefit of clergy even is not excluded.

So here is an act of Parliament, declaring, that any of the King's household, who shall conspire to murder him, may be punished with transportation. What is the observation of my Lord Coke upon this statute? He says, " to de- " stroy or murder the King. By this act, *it expressly ap- " peareth, by the judgment of the whole Parliament*, that be- " sides the confederacy, conspiracy, or imagination, there " must be some other overt act, or deed tending thereunto, to " make it treason within the statute of 25th Edw. III. *And " therefore the bare confederacy, compassing, conspiracy, or " imagination, by words only, is made felony by this act.* But, " if the conspirators do provide any weapon, or other thing, to " accomplish their devilish intent, *this, and the like, is an " overt act to make it treason.*" So that, though the words are so general, that, under the act of Hen. VII., a person might be indicted of felony for conspiring the death of the king, it had never entered into the head of Lord Coke, that, if this were manifested by an overt act, felony, and not treason, could be the relevant charge. On the contrary, he expressly says, that, in order that a prosecution may take place upon that statute, it is necessary that the act charged be not treason.

Now, an oath administered to 500 persons, binding them to levy war against the King, to control him, and oblige him to change his measures, or to control Parliament, is an overt act of a treason created by the 36th of the King. In this respect, I cannot distinguish the case of the statute of Henry VII. from the present; and if, under the law of Henry VII., a man who had entered into a conspiracy to murder the King, could not be tried for a transportable felony, neither could he under the present statute be so tried, having administered such an oath.

Lord Hale says, " Regularly words, unless committed " to writing, are not an overt act within the statute of Ed- " ward III. and the reason given is, because they are easily " subject to be mistaken or misapplied, or misrepeated or mis- " understood by the hearers. And this appears, by those se- " veral acts of Parliament, which were temporary only, or

" made some words of a high nature to be but felony. The " statute of 3. Hen. VII. cap. 14. makes conspiring the " King's death to be felony; which it would not have done, " if the bare conspiring, without an overt act, had been trea- " son."

In like manner, this act of the 52d of the King, makes the administering of an oath binding to commit any treason or murder, or any felony punishable by law with death, a felony; which it would not have done, if the administering of that oath had been an overt act of high treason.

And that proposition includes this other one, that if there be circumstances attending the administering which constitute high treason, then it would not be a felony within this act. If my learned friends will help me out of this dilemma, I shall be obliged to them. It is an implied judgment of Parliament, that the act, which it makes a felony, is not an overt act of treason; and, if an act of Parliament is produced, which makes that a felony, which would otherwise be an overt act of treason, the inference is, that these words of the act are to receive a limited interpretation. I apply this to the act of the 52d of the King, and say, that it can have reference to those instances only which are short of overt acts of high treason. The administering of an oath not amounting to an overt act of high treason, may be a felony within this act, but not otherwise, because Parliament cannot be presumed to have intended to make that felony which was treason; and no overt act of high treason can come within the act as a felony. It cannot be at once a treason and a felony.

My Lord Hale, in treating of the question, how far subsequent statutes are to be taken as interpreting the statute of Edward III., and explaining, by the judgments of the legislature, what facts are, or are not, overt acts under that statute, has this passage: " The statutes 1st and 2d Philip and " Mary c. 3., 1st Ed. VI. c. 12., 23d Eliz. c. 2. making se- " veral offences felony, have this wary clause, " The same not " being treason by statute 25th Ed. III," and he says, " En- " acting an offence to be a felony, is a great evidence that it " was not treason before, and a judgment of Parliament in " point; for it cannot be thought, that it would make that less " than treason, which was treason by 25th Ed. III." Where Lord Coke wishes to shew, that a particular act cannot be an overt act of treason, he thinks it sufficient to shew, that the legislature has treated it as a felony.

I fear, I have trespassed too long on your Lordships' attention. I would apply what I have stated to the present case, and I need not take up much more of your time. I

would apply this reasoning to the act of Parliament in hand; and, I maintain, that there are but these two modes of construction here—Either the act was meant to apply only to those oaths binding persons to commit treason, the administering or taking of which oaths, does not constitute an overt act of treason,—I say, either this necessary restriction of the words is to be adopted in their construction;—or else, there is one other alternative, and it must be held, that the statute of the 52d of the King repealed the acts of Edward III. and Queen Anne. There is no third way of interpreting the act of parliament, and it would be an insult to the understanding of the Court, to argue which you should adopt—whether you should take that construction, which makes the act provide for the emergency for which it was passed, and leaves untouched the statute of Anne, which was introduced for the safety of the subject—whether you shall adopt that construction which unites, with the remedy for the grievance in the view of the legislature in passing the act, the leaving the valuable provisions of former statutes untouched—or whether you shall take the opposite construction, which would repeal the whole of these laws, and would introduce, into the law regarding treason, a rule which would be oppressive to the subject, and unsafe to the sovereign, by reducing to a transportable felony an overt act of treason.

There is a clause in the acts of Parliament, of the 37th and 52d of the King,—the last clause of these acts,—in the following terms: "Provided also, and it is hereby declared, That any "person who shall be tried and acquitted, or convicted of any "offence against this act, shall not be liable to be indicted, "prosecuted, or tried again for the same offence or fact, as "high treason, or misprision of high treason; and, that no-"thing in this act contained shall be construed to extend to "prohibit any person guilty of any offence against this act, "and who shall not be tried for the same as an offence against "this act, from being tried for the same as high treason, or "misprision of high treason, in such manner as if this act had "not been made." I conceive, that it is from loosely interpreting this clause, that there was a notion entertained by some persons, that there is something in it which opposes the construction I have put on the other clauses. You will observe the very same clause, which is in the statute of the 52d of the King, is in the act of the 37th of the King; which last mentioned act regards the intentions of the parties, as well as the purport and intendment of the oath, and which makes the administering, as well as the taking of the oath, only a transportable felony. The clause is in the one as well as the other act.

Let us see.—It is first said, "That any person who shall be tried "and acquitted, or convicted of any offence against this act, "shall not be liable to be indicted, prosecuted, or tried again for "the same offence or fact, as high treason, or misprision of high "treason:"—let us see, if there be not a case consistent with our interpretation, which renders this enactment necessary.

Suppose a person to be brought to the bar, under this very charge which is here stated against the prisoner, for administering or taking an oath binding to the commission of high treason, but by the levying of a war, other than that particular sort of war described in the statute of the 36th of the King. It is laid down by all the authorities, that the conspiring to levy war generally is not an overt act of treason. The conspiring the death of the King is a treason—and the actual killing of the King cannot be prosecuted as a murder, but must be prosecuted as an overt act, testifying an intention to put the King to death. Conspiring to levy war is *not* treason—the levying of war itself *is* treason. Then comes the statute of the 36th of the King, which declares the compassing or imagining the levying of war for certain purposes, as, to constrain the King, or either, or both houses of Parliament, shall be considered an overt act of treason. The meaning of this oath, then, if it be not mere words which mean nothing, was to bind a number of persons to levy war, and this to constrain the King, or either, or both houses of Parliament, and this amounts to an overt act of treason under the statute of the 36th of the King, and cannot be tried as a felony.

Suppose war levied for the purposes professed by those unfortunate persons who assumed the name of Luddites; for the purpose of destroying, in the town of Nottingham and its vicinity, particular pieces of machinery used in the knitting of stockings. To destroy stocking-frames, or any particular pieces of machinery, in any particular place or district, is neither levying war under the statute of Edward III. nor under the 36th of the King. Suppose they had levied war—suppose they had conspired to levy this sort of war—it would not be treason. It could only be tried under this act, which makes it felony.

Suppose a person accused of felony, under this act for administering oaths, to levy such sort of war as is treason under the act of Edward III. but the *conspiring* to levy which is *not* treason; and, suppose him to be acquitted—and suppose war afterwards levied by those with whom he had conspired; then, by the law of England, without the last clause in this act, he might be tried over again for treason, though he had been acquitted on the trial for felony. It was necessary to insert this clause, or else this evil would have arisen. The legislature were

aware, when they enacted, that the administering of an oath to commit treason should be felony, that it approached near to an act constituting high treason; and they therefore declared, that, though it should happen afterwards to be discovered that it amounted to high treason, if this did not appear at the time of a trial for the administering as a felony, the administrator should be entitled to plead the acquittal. That was equitable.

Suppose a person convicted of the minor offence of taking the oath, and sentenced to transportation; the act declares he shall not be again tried for this minor offence, though it may have involved him in high treason. It is a reasonable object to attribute to the legislature, the intention of putting by this law the subjects of this country in safety, and preventing them from being oppressed by the officers of the crown.

The legislature have in their view, that, in cases of treason, the counsel of the crown are employed, and great pains taken to convict the accused—that the minds of the jury, too, are likely to be poisoned with prejudice against them. The legislature, therefore, where there is a charge of treason, give different rules and afford different safeguards, from those in common cases of felony; and, is it reasonable that this act of Parliament, made for a particular purpose, should be held to deprive the subject of these safeguards?—or can it be *held* that great treasonable offences may be committed, and *only* punished by transportation? You see how the Judges proceed in such a case in England. If a person be indicted for felony, and, either upon the face of the indictment, or otherwise, it appear to the Judges that the act charged is treason, they would desire the indictment to be withdrawn, and an indictment for treason to be preferred. Suppose the trial proceeds without any such objection, and, on the evidence, treason is found to have been committed, the Judge discharges the jury of that indictment. Judge Foster says, I will not give a chance of acquittal. But I will discharge the jury, and will give the prisoner the benefit of the mode of trial appointed for cases of treason.

What is the result of an opposite construction of the act? It is this. All actions are popular in England. Persons accused by any one of the people of conspiring to commit treason, must be brought before a grand jury—but, according to the prosecutor's construction of this act, they may be guilty of treason, and yet be tried in the ordinary way, and as only guilty of a felony. An accomplice may indict them under these acts, and those, who ought to be capitally punished for

treason, may be transported for seven years as for an inferior felony.

I submit, upon all these views, the prosecutor's construction cannot be put upon this act. Felony merges in treason; and if, in an indictment for felony, the prosecutor make a charge of treason, or if the facts of the case turn out and appear on the evidence to be treason, you cannot proceed in the trial for felony; neither by the rule of the common law of England, nor by the statute of Anne referred to. There are no words in the act 52d of the King, which go to repeal the act of Anne, or abrogate the common law. The interpretation given by the prosecutor would involve the acts in contradiction and absurdity, and ascribe views which cannot be ascribed to the legislature. I submit, that, according to my construction, the act is consistent with the remedy for the evil—with the intention of the legislature—with common sense—and with sound construction of law.

I may have stated some things at too great length, and some at too little. I was anxious to explain my view of this case; and in so doing, I have, I fear, trespassed too long on your Lordships' time and attention.

Lord Justice Clerk.—There is no occasion for any apology at all.

Mr. Clerk.—An important objection to the indictment has been noticed by the Court, with respect to which, it has been asked by your Lordships, whether the counsel for the prisoner have a wish to argue it? I beg leave to offer a few observations upon the point.

The objection is, that the allegations in the indictment do not describe that offence, which is prohibited by the act of Parliament, and therefore the indictment is irrelevant and inept. The crime described in the statute, is the administering an oath or engagement, *purporting or intending* to bind the person taking the same, to commit any treason, &c. But the prisoner is not charged with an offence so described; the charge against him in the minor proposition of the indictment being, that he administered an oath or engagement, *binding*, (not purporting to bind) the persons taking the same to commit treason. Thus there is a manifest difference between the statutory offence and that which is charged in the indictment. To administer an oath, *purporting or intending* to bind the person taking the same, is an act highly criminal, and accordingly, it is by the statute punishable with death. But the allegation against the pannel charges him with an act, which is

not punishable by the statute, in which no such offence is mentioned. In all probability no statute will ever be made, declaring that which is charged against the prisoner in this indictment to be punishable with death, or with any other punishment or penalty whatever. But, at all events, the prosecutor has totally failed in this indictment to describe the statutory offence. Indeed, the prosecutor's description of the crime supposed to have been committed defeats itself, by containing a plain and direct contradiction in its terms. He alleges that the prisoner administered an oath, *binding* the persons taking the same to commit treason. This allegation presupposes, that a person, taking an oath to commit high treason, is *actually bound* by such an oath, which is an evident absurdity. An oath may be binding where its obligation is to do a thing that is *legal* or *innocent*; but no obligation or binding engagement can ever result from an oath to commit high treason, or an oath to commit any other crime. Nobody can be *bound*, by the most tremendous oath, to violate every previous obligation and engagement he has come under. As the prosecutor describes the offence, therefore, no such offence could exist; and the statement of it is a contradiction in terms, in so far as it supposes the party taking the oath to be bound *by his allegiance*, without which he could not commit high treason; and supposes, at the same time, that he was *not bound* by his allegiance, but actually bound by the oath which he took. Such an absurdity as this, can never be sustained in any criminal charge, or indeed in any legal proceeding; and much less can it be sustained in a charge upon which the accused party is to be tried for his life. But, though the absurdity were less evident than it is, the objection to the terms of the charge is insurmountable, upon the plain and simple fact that the averment of the prosecutor does not charge the prisoner with the *statutory* offence. It would indeed have been very extraordinary, if the legislature, in describing an offence, of so high a nature as to be punishable with death, had fallen into the absurdity which has crept into this indictment. The statute does not assert, or acknowledge the possibility of administering or taking an oath, of strength enough to *bind* the person taking it to commit high treason, or to commit murder, or any other crime. On the contrary, it is clearly implied, in the very terms of the statute, that such oath is, to all intents and purposes whatsoever, destitute of binding force. The criminality contemplated in the statute, is that of violating, by the total perversion and misapplication of a solemnity, the obligations which bind men to each

other in society—a violation of the most dangerous nature, perpetrated by the most wicked means. To administer an oath, *purporting or intending* to bind the person taking the same to commit any treason or murder, is a wicked and dangerous violation of the most sacred engagements, though it cannot alter them. This is the statutory crime; but as no such crime is charged in the indictment, the objection suggested on the Bench is perfectly well founded.

Mr. Drummond.—It is now my duty to submit to your Lordships, some remarks upon the other side of the question; and, after the long discussion which has already taken place, upon almost the same indictment as that now under your view, and after the ample time which you have had for private consideration of the subject now before you, I do not feel myself called upon to enter so much at large into the case, as otherwise I might have done. Indeed, there were some arguments used upon the other side of the bar of which I shall omit all notice, as not appearing to me to have any intimate connection with the points at issue, or to be likely to influence the ultimate decision. But there are others which are of great importance; and to these I shall at once proceed.

The first and great point that appears to me for your Lordships' consideration, is, the construction and meaning of this oath; for, unless the oath has the meaning which we put upon it, it is unnecessary to say a single word upon any other part of this indictment. By what rule of construction then, are we to find out the meaning of the oath? Are we to take the literal meaning of the words, or to put a more *liberal* construction upon them? I am not afraid of any of the rules of construction that may be adopted on the other side of the bar; but I suppose it is unnecessary for me to say any thing as to the *literal* meaning of the words, as this will obviously bear but one interpretation; and this is not the mode my learned friends have had recourse to. Let us then take the plain meaning and sense of the oath, and put upon it that meaning which, in the common intercourse of life, is put upon words; and, I have no hesitation in saying, that this is the rule of construction by which, in my opinion, the oath should be tried. The counsel on the other side, have employed great ingenuity in attempting to construe the oath, and have taken a way, which no man of common sense, in the ordinary affairs of life, would have hit upon. They have endeavoured to construe out of the oath, a reservation of illegality, that is, of illegal measures, for the prosecution of the objects in view by those bound by the oath. They assert,

that when this oath was taken, this reservation was understood to be implied, that the objects in view, were meant to be accomplished by all legal methods, but not by any illegal methods; and they say, that your Lordships are called upon to give this construction and meaning to the oath. Upon the other hand, I have to submit that there is no reservation of illegality within the compass of this oath. The oath is general, and has no reservations; it extends to, and includes all methods necessary for the accomplishment of the ends in view, whether by moral or physical strength.

In construing the meaning of the oath, in a question of relevancy, you will take into view, not the mere meaning of the words of the oath itself, but also all the circumstances under which it is libelled that the oath was administered and taken. It is libelled, that the oath was wickedly, maliciously, and traitorously administered; and imported an obligation to commit treason. If the oath *may* mean what the prosecutor says it does, as he libels that the act was done wickedly, maliciously, and traitorously, I have to submit that the charge is relevant, and that the prosecutor is not bound, in this stage of the process, to shew that this is of necessity the meaning of the oath. He is entitled to stand upon this ground, that, if the oath *may* mean what he says it does; and *may* bear the meaning with which, in the indictment, he says it was administered and taken, you are bound, libelled as it is, to give it the construction which the prosecutor says it bears, to the effect of sending the charge to a jury. It will ultimately remain for the jury to decide as to the guilty purpose.

But this is not the naked case before your Lordships. There are other circumstances which are not to be lost sight of in construing this oath. Your Lordships, in looking at the indictment, will see that the oath was administered at *secret meetings;* a material circumstance in considering the views and intentions with which it was administered. You will remember, that the society or conspiracy which was in view of the persons who administered and took this oath, was one of a very extensive nature, including a brotherhood of Britons of every description; and that the oath was actually administered to several hundred persons. These are remarkable features of the case, that the oath was so extensively administered, and that the object of the association was so unlimited. It is also set forth in the indictment, that this oath has been administered to persons who, conscious of their guilt in the premises, have absconded and fled from justice; and this is a circumstance relevant to pass to an assize, and, like all the other circumstances libelled, must be taken for granted as true by your Lordships in judging of the relevancy.

The taking of any oath of secrecy is, of itself, a presumption of guilt; and a secret purpose of any kind, is a presumption against the pannel. I know, that other oaths were alluded to by the opposite counsel; and, as an instance of innocence with regard to the objects of them, those of Freemasons were cited. But, I submit, that I am correct in stating the general rule, and that these form an exception. Freemasonry is an old piece of folly, at least; and, it is not only notorious that Freemasons have nothing to conceal, but it has been ascertained by experience, that mischievous consequences have not, in this country, followed from the oaths of secrecy of that institution. But, though there may be secret oaths of an innocent description, the presumption is against them, and particularly against such an oath of secrecy as the present, under the awful sanction of death; for it seems to have been a standing rule of the conspiracy to murder all informers.

The attempts, however, to shew that the oath might be quite innocent, appeared at length to be abandoned, and a distinct admission was made, that the administering or taking of this oath is a "misdemeanor;" by which, I suppose, was meant (for the word has no technical meaning here,) something criminal at common law, though not in the highest degree. Now, if it be criminal, in what can the criminality consist but in the treasonable purpose and preparation? There is plainly no other wicked or unlawful purpose in view.

The oaths of allegiance, of supremacy, and others, were alluded to by Mr. Cranstoun, who ingeniously argued, that, according to our principle of construction, the administration of these oaths might be held to imply an obligation to commit treason. But the question here is not what extraordinary constructions the ingenuity of learned men may put upon what may be placed before them. The question is, What would a man of common sense think upon the subject, did it come before him in any ordinary transaction of life? Such fanciful illustrations are little to the purpose. But I happen to have here a specimen of another oath, the striking similarity of which to the present cannot fail to attract particular attention. It was the foundation of all that conspiracy in Ireland, which afterwards ended in open rebellion against the government; and your Lordships will see, how the terms of the oath cited in the indictment tally with the terms of the oath, or test, as it was called, which I am now to read: "In "the awful presence of God, I, A. B. do voluntarily declare, "that I will persevere in endeavouring to form a brotherhood "of affection among Irishmen of every religious persuasion; "and that I will also persevere in my endeavour to obtain an

" equal, full, and adequate representation of all the people of " Ireland. I do further declare, that neither hopes, fears, re- " wards, or punishments, shall ever induce me, directly or in- " directly, to inform on or give evidence against, any member " or members of this or similar societies, for any act or expres- " sion of theirs done or made, collectively or individually, in " or out of this society in pursuance of the spirit of this obli- " gation." I hear one of the opposite counsel remark, that this oath contains no obligation to commit treason; but, I do not know with what view the remark is made, unless it be to mark the contrast between the oath which introduced the Irish rebellion and all its terrible consequences, with that more atrocious oath now under consideration.

The terms of the oath in the indictment are now so well known to your Lordships, that I need not point out the particular differences between the two oaths.

What the prosecutor says is, that this oath means to bind the person taking the same to commit treason; and it is objected, that he has not told your Lordships, on the face of the indictment, what species of treason the taker of the oath is bound to commit. Here, I must request your Lordships' attention to what appeared to me to be a palpable fallacy in the opposite argument. The case was all along pleaded by the learned gentleman, as if the prosecutor had been charging the pannel with the crime of treason itself. Now, there is no charge of treason; but a charge of administering an unlawful oath—an oath binding to commit treason, which object of the oath must indeed be libelled, otherwise there is no relevant charge But the indictment is not to be construed as if it had been libelled that treason was actually committed; nor is such a specification of treason to be required as if it had been charged as the offence of which the pannel is accused, and for which he is brought to trial, and not merely as existing in intention. The essence of the relevancy is what the pannel did, not what he had in view; of which, no more can be told than what the oath itself reveals. Any thing else is an inference in law, which can add nothing to the relevancy. Now, although the prosecutor has not drawn an inference in law from the facts, he has told your Lordships, not only the acts done, but all that he knows of the acts which the parties bound themselves to commit. He tells what the facts are, which, it is the inference in law, if done, would have been treason. But, in judging of the relevancy, you are not merely to judge whether the prosecutor is right in his inference from the facts. Your Lordships will go to the oath, and draw the conclusion in your own minds.

At the same time, I have no hesitation in saying here, that the kind of treason which the parties bound themselves to commit, is plainly that of levying war against the King. I shall presently speak more particularly to the treason, and will shew, that the treason which the oath bound to commit is that now alluded to.

Before leaving the oath, I may make some farther remarks upon what, with such ingenuity and force, was stated by Mr. Cranstoun. Instead of taking the whole oath into view, he divided it into four parts, and drew separate conclusions from all those parts—a rule of construction quite out of the question. It might be as well pleaded to a jury, in a case of circumstantial evidence, that they are to judge of each circumstance by itself. Mr. Cranstoun set out in construing the oath, with stating, that a brotherhood of affection is an innocent, and even a laudable object, and somewhat quaintly added: "That it is a pleasant thing for brethren to dwell together in unity." This may be very ingenious, but I say, with deference, that it is trifling with the case, to make such remarks to your Lordships. The oath is not to be torn piece-meal. The meaning is to be drawn from a fair consideration of the whole of it. I might as well take each word or letter of the oath individually, and say, that every word or letter taken by itself is not criminal, as thus break it into parts, and argue upon each without reference to the rest. Not that I think his conclusions, even as he took the clauses, were justified by the clauses themselves. I cannot admit any such thing—but I protest against this way of construing the oath, or construing any thing.

It was said, founding upon the other argument, the reservation of illegality, that we may petition for annual parliaments and universal suffrage—that these objects *may be* accomplished by lawful means—and, from this, the conclusion was drawn, that there *was* nothing illegal done or intended. But the question is, whether the end can justify any means that may be employed in obtaining it. It is the *violent means* which we charge as criminal, and these are left totally out of view, in the argument on the other side of the bar.

Then the word "strength" is taken up, and a construction is given to it to shew, that the term in the oath was applicable to an individual, and not to a number of individuals. There the learned gentleman lost sight of the beginning of the oath, where the brotherhood is mentioned. From this, however, and the whole context of the oath, I apprehend it to be perfectly clear, that in considering the meaning of the word "strength," we are not to apply it to an individual, but to as many as could be brought to join in this society or conspiracy.

On the whole, I must confess that I have not been able to discover the distinction between force and strength in this oath. It would have conveyed the same conclusion to my mind, if the one word had been employed as well as the other. Physical strength has just as plain and obvious a meaning where it stands, as any words can have. It is not an uncommon expression among the lower orders of politicians; and, I am afraid, the idea is perfectly familiar to them. Now, notoriety is as good a rule of construction as could be had recourse to. It was said, that grammatical niceties are out of place here, and that strict rules of criticism would be misapplied in interpreting the language of such a man as the pannel at the bar, and I perfectly approve of the remark. I wish the oath to be taken in the meaning which men in the lower ranks of life would apply to it. Strength, as it here stands, can mean nothing else than the means, the power, or force, to be employed against the obstacle or contrary force that might stand in the way of the accomplishment of the objects in view, whatever they might be; and the united strength of numbers is plainly meant.

Supposing it were possible to put such a construction upon the words as that contended for on the other side of the bar, let us see the effect of it—let us attempt to insert such unambiguous words as would unquestionably give the oath what they say is the meaning of it; and, a fairer test it cannot be tried by.—Thus: "But I bind myself to do nothing contra-" ry to law, or to attempt any thing by force against any sub-" sisting right;" I ask, if these words were stuck into the middle of this oath, if they would not stultify it, and make it quite contradictory, and palpably absurd.

A great deal was said about the presumption in favour of the innocence of the pannel. This is a common topic of declamation; but, I must confess, I never could understand the presumption of the innocence of a pannel. I am aware that the *onus probandi* lies upon the prosecutor, and that if he fail to make out his case, the pannel must be assoilzied; but I see no room for a presumption of any sort, but what arises from the want of contrary proof; and I know of no such doctrine in any work upon the criminal law of Scotland. The fact is, that in a question of relevancy, there is rather a presumption of guilt; or, to speak more correctly, an assumption of the truth of the libel. Every thing is supposed to be wickedly and maliciously done, as libelled; and the question is, supposing all this proved as charged, does it infer a punishment in law? as, otherwise, it is impossible to allow a proof of what is alleged. —I might argue, that the presumption is against the man who

takes such an oath as that libelled, which even my learned friends admit to be contrary to law, and a punishable offence, though not of the description set forth in this indictment; and that, from the very circumstance of the pannel having taken such an oath, the *onus* lies no longer with the prosecutor to prove his guilty purpose, but with the pannel to reconcile his conduct to innocence if he can. But, upon any view of the subject, I should like to know what presumption, or what rule or principle calls for such a construction as that put upon the oath. Is it the protection of innocence, or that "*sense of public duty*" that was spoken of in the last debate, or any laudable principle under the sun, that makes it necessary to do such violence to language and common sense, to suppress the truth, or to pervert the plain sense and fair meaning of any thing?

I shall now beg leave to request your Lordships' attention to what the persons administering and taking this oath bound themselves to do; and, I have to submit, that it is plain, from all the authorities upon treason, that the accomplishment of universal suffrage, when carried into effect by the force of numbers, is treason, by levying war against the King. It infers the destruction of the British constitution; which could not subsist for a single day under such a system of things, in the present circumstances of this extensive empire. The accomplishment of any public purpose by violence is treason; but, to accomplish universal suffrage by violence, is undoubtedly a destruction of the constitution itself. I do not believe that there is a difference among any of the great authorities upon this point. In looking for authorities, I naturally had recourse to some of the late trials for treason in England, to see how the judges there laid down the law in such cases. Lord Loughborough, in the case of Lord George Gordon, said, "I am peculiarly happy that I "am enabled to state the law on the subject, not from any "reasonings or deductions of my own, which are liable to "error, and in which a change or inaccuracy of expression "might be productive of much mischief; but from the first "authority, from which my mouth only will be employed in "pronouncing the law, I shall state it to you in the words of "that great, able, and learned judge, Mr. Justice Foster, "that true friend to the liberties of his country." I quote this, to shew to what authorities the English judges have recourse, when considering questions of this kind. At the end of this trial, the same law was laid down by Lord Mansfield; but I shall first read the passage from Foster himself, p. 208. Part of it was already read by the learned gentleman opposite, but, as he stopped exactly where I wished him to go on, I

shall be under the necessity of reading the whole of it. I request your Lordships' attention to the manner in which Foster differs from the opinion of Hale, on the very point on which Hale's authority has been so much rested on in the present case, and for which he has been called the "great father of "the law of treasons." Hale's opinion does not appear to me to be quoted as so completely conclusive on the question by the great authorities in England as is done here. They have recourse to more recent expositions of the law.

"Lord Chief-Justice Hale, (says Foster,) speaking of "such unlawful assemblies as may amount to a levying of "war within the 25th Elizabeth, c. 3, taketh a difference "between those insurrections which have carried the appear- "ance of an army, formed under leaders, and provided with "military weapons, and with drums, colours, &c. and those "other disorderly tumultuous assemblies, which have been "drawn together, and conducted to purposes manifestly un- "lawful, but without any of the ordinary shew and apparatus "of war before mentioned.

"I do not think any great stress can be laid on that dis- "tinction. It is true that, in case of levying of war, the in- "dictments generally charge, that the defendants were armed "and arrayed in a warlike manner; and, where the case "would admit of it, the other circumstances of swords, guns, "drums, colours, &c. have been added. But, I think, the "merits of the case have never turned singly on any of these "circumstances.

"In the cases of *Damaree* and *Purchase*, which are the last "printed cases that have come in judgment on the point of "constructive levying war, there was nothing given in evi- "dence of the usual pageantry of war;—no military weapons "—no banners or drums—nor any regular consultation pre- "vious to the rising. And yet the want of those circum- "stances weighed nothing with the Court, though the prison- "er's counsel insisted much on that matter. The number of "the insurgents supplied the want of military weapons; and "they were provided with axes, crows, and other tools of the "like nature, proper for the mischief they intended to effect:

"*Furor arma ministrat.*"

"*Sect. I.*—The true criterion, therefore, in all these cases, "is *quo animo*, did the parties assemble? For, if the assem- "bly be upon account of some private quarrel, or, to take re- "venge of particular persons, the statute of treasons hath al- "ready determined that point in favour of the subject."

"*Sect. III.* (p. 210.)—But every insurrection which, in judg- "ment of law, is intended against the person of the King, be

" it to dethrone or imprison him—or to oblige him to alter his " measures of government—or to remove evil councillors from " about him—these risings all amount to levying war within " the statute; whether attended with the pomp and circum- " stances of open war or no. And every conspiracy to levy " war for these purposes, though not treason within the clause " of levying war, is yet an overt act within the other clause of " compassing the King's death. For those purposes cannot be " effected by numbers and open force without manifest danger " to his person.

" *Sect IV.*—Insurrections, in order to throw down all en- " closures, to alter the established law, or change religion, " to enhance the price of all labour, or to open all prisons; " all risings, in order to effect these innovations, of a public " and general concern, by an armed force, are, in construc- " tion of law, high treason, within the clause of levying war. " For, though they are not levelled at the person of the King, " they are against his royal majesty; and, besides, they have " a direct tendency to dissolve all the bonds of society, and " to destroy all property, and all government too, by numbers, " and an armed force. Insurrections likewise for redressing " national grievances, or for the expulsion of foreigners in ge- " neral, or indeed any single nation living here under the pro- " tection of the King, or for the reformation of real or ima- " ginary evils *of a public nature, and in which the insurgents " have no special interest;* risings to effect these ends by force " and numbers, are, by construction of law, within the clause " of levying war; for they are levelled at the King's crown " and royal dignity."

Farther, in speaking of the case of Damaree and Purchase, formerly mentioned, he says, (p. 215.) " Upon the trial of Da- " maree, the cases referred to before, in sections 4th and 5th, " were cited at the bar; and all the judges present were of opi- " nion, that the prisoner was guilty of the high treason charged " upon him in the indictment. For here was a rising with " an avowed intention to demolish all meeting-houses in ge- " neral; and this intent they carried into execution as far as " they were able. If the meeting-houses of the Protestant " dissenters had been erected and supported in defiance of all " law, a rising to destroy such houses in general, would have " fallen under the rules laid down in Keiling, with regard to " the demolishing all bawdy-houses. But, since the meeting- " houses of Protestant dissenters are, by the Toleration Act, " taken under the protection of the law, the insurrection, in " the present case, was to be considered as a public declara- " tion by the rabble against that act, and an attempt to ren-

" der it ineffectual by *numbers and open force.*—According
" ly, Damaree was found guilty, and had judgment of death,
" as in cases of high treason."

These were the passages quoted as authorities by Lord Loughborough in the trial I have mentioned. And in the charge to the jury by Lord Mansfield, at the close of the trial, a summary of the same doctrine is very clearly laid down. " There are two kinds of levying war; one against the per-
" son of the King; to imprison, to dethrone, or to kill him;
" or to make him change measures or remove counsellors—
" the other, which is said to be levied against the majesty of
" the King, or, in other words, against him in his royal capa-
" city; as when a multitude rise and assemble to attain by
" force and violence any object of a general public nature, that
" is levying war against the majesty of the King; and most
" reasonably so held, because it tends to dissolve all the bonds
" of society, to destroy property, and to overturn government,
" and, by force of arms, to restrain the King from reigning ac-
" cording to law.

" Insurrections, by force and violence, to raise the price of
" wages, to open all prisons, to destroy meeting-houses, nay,
" to destroy all brothels, to resist the execution of militia
" laws, to throw down all enclosures, to alter the established
" law, to change religion, to redress greivances real or pretend-
" ed, have all been held levying war. Many other instances
" might be put. Lord Chief Justice Holt, in Sir John
" Friend's case says,—' If persons do assemble themselves, and
" act with force in opposition to some law which they think in-
" consistent, and hope thereby to get it repealed, this is levy-
" ing war and treason.' In the present case, it does not rest
" upon an implication that they hoped, by opposition to a law,
" to get it repealed; but the prosecution proceeds on the di-
" rect ground, that the object was, by force and violence, to
" compel the legislature to repeal a law; and therefore, with-
" out any doubt, I tell you the joint opinion of us all, that if
" this multitude assembled with intent, by acts of force and
" violence, to compel the legislature to repeal a law, it is high
" treason. Though the form of an indictment for this spe-
" cies of treason mentions drums, trumpets, arms, swords,
" fifes, and guns, yet none of these circumstances are essenti-
" al. *The question always is, whether the intent is, by force*
" *and violence, to attain an object of a general and public na-*
" *ture by any instruments, or by dint of their numbers.*

" In like manner, Serjeant Hawkins thus expresses himself:
" Those, also, who make an insurrection in order to redress a
" public grievance, whether it be a real or pretended one, and

" of their own authority attempt with force to redress it, are " said to levy war against the King, although they have no " direct design against his person, inasmuch as they insolent- " ly invade his prerogative, by attempting to do that by pri- " vate authority, which he by public justice ought to do, which " manifestly tends to a downright rebellion; as where great " numbers by force attempt to remove certain persons from " the King; or to lay violent hands on a privy counsellor; or " to revenge themselves against a magistrate for executing his " office; or to bring down the price of victuals; or to reform " the law or religion; or to pull down all bawdy-houses; or " to remove all enclosures in general, &c. But where a num- " ber of men rise to remove a grievance to their private inte- " rest, as to pull down a particular enclosure, intrenching upon " the common, &c. they are only rioters."

I am not afraid to place beside all these great names our own authority, Mr. Hume, in whose work you will find a most luminous and accurate summary of the doctrine which I have now been quoting from the English authors. In page 427, Mr. Hume says: " In the construction of law, the levy- " ing of war against the King is not understood in those in- " surrections only which have immediate relation to the per- " son of his majesty, as if the object be to dethrone or im- " prison him, or to drive him out of the realm, or to cause him " alter his measures, or to remove evil counsellors from his " presence. It equally embraces all those risings, which, though " not aimed directly at the person of the King, are however " against his royal majesty, that is, against his crown or " royal dignity, against his prerogative, authority, or office. " Under this description, according to all authorities, falls an " insurrection for any of these objects,—to reform the esta- " blished law, religion, or political constitution of the land; or " to obtain redress for national grievances, whether real or ima- " ginary. For though they be real, the law and government " of the realm, as long as they subsist, cannot know any thing " of this course of correcting them, nor make account of it as " any other than rebellion against the King, who, as head of " the state, is bound to prevent all such forcible interference of " private persons with his own functions, or those of the legis- " lative power."

By all the authorities, the same rules of law are clearly and distinctly laid down, and they are quite applicable to the present case. The treason which the oath binds those taking it to commit, if the public purpose in view had been carried into effect, viz. the establishment of universal suffrage, by force and violence, would have been levying war against the King.

A passage was quoted from Lord Hale by the learned gentleman, in disapprobation of an expression in the indictment, " the subversion of the established government," as being too vague for a charge of treason. But, it would not escape your observation, that he read only three lines, and left out the subsequent part of the passage in the indictment, which is the example and explanation of what he did read, and contains every specification that is possible in the circumstances of the case. The statement in the indictment is, " which oath or engagement, or obligation to the foregoing " purport, did bind, or did purport or intend to bind, the per- " sons taking the same to commit treason, by effecting, by " physical force, the subversion of the established government, " laws, and constitution of this kingdom, and *especially by* " *obtaining annual parliaments and universal suffrage by un-* " *lawful and violent means.*"—As to the word *force*, it was introduced merely to express our conception of the meaning of the oath, and to shew, that we understand *strength*, where it stands, to include every meaning that any person could suppose to be contained in *force*, had it been there; and it is for your Lordships to say whether we are right or not.

There is another part of the indictment to which an objection was made—the passages at the end of each specific charge, which, it is said, are not exactly in terms of the expressions of the statute. The truth is, those clauses are altogether mere surplusage. There is, besides, a previous reference to the general clause at the commencement of the indictment. " Ad- " minister or cause to be administered, or did aid or assist at the " administering, an oath, or engagement, or obligation, *in the* " *terms above set forth, or to the same purport.*" But, above all, there is a most distinct reference in the phrase, " *as said is,*" which takes back the attention to the whole preceding generality. This is the general mode of expression where many instances of a crime charged are stated—" *as said is,*" being added to each instance that is given. Forgery and uttering forged notes, for example, are charged in a general clause at the beginning of an indictment, and then particular instances are given in much shorter terms, referring to the preceding generality; and, unless this is done, what precedes must be totally useless, and mere surplusage. Now, you will observe, the general charge is the only one in which the oath appears, and reference must be made to the clause containing the oath in which the words of the statute are exactly repeated. But, in any point of view, it never was the doctrine of our law to require the repetition of the precise same technical terms as are used in the major proposition. Hume, III. 304.—The act of Parlia-

ment libelled on, contains references in this manner, from one clause to another.

There is another part of the indictment to which I am surprised the opposite counsel did not make an objection similar to that to which I am now speaking. It is in what is called the "at least" clause, where the word *intend* does not occur. But the answer is, that the word is of little value to the prosecutor in the present case, where the express meaning is so clear; and, at all events, the attention must be carried back to what precedes by the words, "*as said is.*" "The said oath or "engagement," also, implies the whole of what goes before. But, in case this answer should not be satisfactory, I beg leave to read an opinion delivered from the chair of this Court by your Lordships' predecessors, in the case of M'Intyre, and others, tried for house-breaking, in 1809; and his Lordship did no more than illustrate the doctrine laid down by Mr. Hume. I read from Buchanan's reports, page 84. In addressing the jury, the learned judge said: "It was formerly held, that if the "public prosecutor did not succeed in proving the whole train "of circumstances stated in the indictment, the jury could "not convict the prisoners. This was felt to be a great evil; "since, in a long and minute statement, it was very often found, "that a few particulars were not reached by the evidence; "and therefore the act was passed, which declares it sufficient "for the public prosecutor to set forth in his indictment, that "the pannels were guilty actors, or art and part; not tying "himself down to prove the whole specific detail of the facts, "but simply, that the pannels were special actors of the crime, "or art and part, that is, accessary to it by participating in "it, or giving assistance either before or after the commission. "But there is nothing in the act which says in what part of "the indictment this charge shall be brought forward. It is "usual, indeed, to state it in that part of the indictment men-"tioned by the prisoner's counsel; but if not stated in the first "part, it must come in the last part—in the clause beginning "with 'at least.' But if it be stated in the first part of the "indictment as accompanying the direct charge, it is unneces-"sary to repeat it in the latter part." From this it appears, that the indictment would be perfectly relevant without this clause at all; and, on the other hand, if this clause be correct, it will supply every other defect of specification in the indictment. In short, it is here entirely for the benefit of the prosecutor. Hume, Vol. III. 412, &c.

One part of the case still remains unnoticed; that new view of it pleaded by Mr. Grant. I am not sure that I was successful in obtaining a distinct conception of the bearing of great

part of that argument. But I must hazard one or two remarks upon it before I sit down. The first remark I shall make is sufficiently obvious, that it was quite contradictory of the argument held by Mr. Cranstoun, who maintained that there is no treason in the case; and your Lordships are reduced to the necessity of rejecting the one or the other. That point of view I need not enlarge upon.

Your Lordships will next observe, that this statute, upon which the indictment is founded, is not an English statute. It is a Scottish statute to all intents and purposes, when before your Lordships in this Court; and I cannot conceive by what operation you can, in interpreting this Scottish act, introduce a rule of the common law of England. I may have misconceived the learned gentleman's argument; but I must state fairly the impression which it left upon my mind. You will observe, that, in this act, there is an express clause extending it to Scotland, and providing how it is to be carried into effect here. "Provided also, that any offence against this act, if committed in Scotland, shall and may be prosecuted, tried, and determined, either before the Justiciary Court at Edinburgh, or in any of the circuit courts in that part of the united kingdom." And then follows the clause, "That any person who shall be tried and acquitted, or convicted of any offence against this act, shall not be liable to be indicted, prosecuted, or tried again for the same offence or fact as high treason, or misprision of high treason; and that nothing in this act contained, shall be construed to extend to prohibit any person guilty of any offence against this act, and who shall not be tried for the same as an offence against this act, from being tried for the same as high treason, or misprision of high treason, in such manner as if this act had never been made." How it is possible to get over these clauses of the act I know not. From this last clause, it clearly appears to have been in the view of the legislature, to make punishable under this act a crime that might have been punishable as treason. Now, if punishable here, it must be by our common forms, and cannot be otherwise. The statute of Queen Anne, in cases of treason, extended to Scotland the English statute law of treason, and regulated the forms for trials for treason; but it did not introduce any general principle of the common law of England for the interpretation of Scottish acts of Parliament. If this had been a trial for treason, that act would have required us to have recourse to the statute of Edward III.; but this is a trial of a Scottish law offence; and it is impossible to maintain that the statute of Queen Anne, by implication, abolished the common law of Scotland

as to Scottish law offences—offences, perhaps, of a totally different description from treason. By what rule of law then are you to proceed in applying this act against the administration of unlawful oaths but by the law of Scotland?

Your Lordships do not require to be reminded, that it is possible to try crimes by a lower denomination than the highest by which they may be tried. It happens daily, in the practice of this Court, that the prosecutor selects a lower denomination, notwithstanding the pannel might be tried for a higher offence. There is another rule of the law of Scotland which sets the matter at rest—that in no case whatever there can be a second trial for the same crime. That is not the case in England. A man may there be tried over again for the same fact, under a different denomination of crime; so that it cannot, under any view of the subject, be prejudicial to the pannel to be tried under this act, as he can never again, upon any pretence, be called to account for the same facts charged against him in this indictment. This principle shews how useless the principle of the law of England contended for would be in our Courts, and how inapplicable to our practice.

In the cases of sedition tried in 1794, I rather think in the trial of Skirving, it was laid down by several of the Judges, and admitted at the bar, that some of the acts charged amounted to treason, and yet they passed to the jury in a charge of sedition. The objection was not indeed pleaded at the bar, but the fact was in the view of the judges, and particularly, if I mistake not, mentioned by Lord Abercrombie, and the Lord Justice-Clerk. It did not therefore pass unnoticed, and yet the judges and lawyers of those days saw no objection to let the charges go to a jury.

There are many other things I ought to have stated, which, I dare say, I have omitted. But there is a great part of the argument on the opposite side of which I purposely omit to take any notice, as not being at all material to the points at issue, or at all likely to affect the result of the case in this Court; in particular, a good deal of general discussion and remarks on the general nature of your Lordships' duty in the present case, as being different from your duty in common cases. I trust, my Lord, I have said nothing that can tend to introduce into the proceedings of this place, the tone or character of political discussion; but I cannot help remarking, that some things have been said on the other side of the bar of rather too popular a nature, addressed, as they have been, to the unbiassed ears of your Lordships; and (though I am confident they proceeded from the best and purest motives,) intended, as

I must suppose they were, unless it is admitted that they were foreign from the purpose, to influence the grave deliberations of the Judges of a Supreme Court of Justice, before whom a question is at stake, affecting, on the one hand, the life of a fellow-creature, and, on the other, the safety of the state:—"*quos ab odio, amicitia, ira, atque misericordia, vacuos* "*esse decet.*"

Lord Advocate.—As I have no wish to trespass unnecessarily on your Lordships' time, nor to push any case farther than it will fairly bear, I content myself with remarking, that I think every thing has been said that is requisite to satisfy you that this indictment is relevant; and I do not feel myself called upon to take up the time of the Court longer.

Mr. Clerk.—My Lords, I am happy to think, that I shall not occupy so much of your time as would have been necessary, if my learned friend on the other side had not left untouched a great part of the argument, that has been stated for the prisoner at the bar, by the counsel who spoke before me.

It seems to me, that Mr. Drummond has not sufficiently attended to the true nature of the question before the Court. The tendency of a great deal of his argument was to shew, that the oath libelled on by the prosecutor cannot be understood in an innocent sense, or in any sense consistent with the innocence of parties to it. These are propositions which the prisoner need not contradict in this trial, as it is not now incumbent upon him to shew that the alleged oath was altogether free of guilt or criminality. On the contrary, the prosecutor must establish against it the species of criminality imputed in the indictment. It is evident, that an act or deed may be highly criminal, though it does not infer the guilt of high treason; and that a great deal of guilt may be incurred by an oath, although it does not purport or intend to bind the person taking it to commit the crime of high treason. The prosecutor insists, that the purposes of the oath were criminal; and, possibly, he might have said a great deal more than he has said to the same effect. But, it cannot be allowed, that wherever any crime at all has been committed, that must be the crime of high treason. The prosecutor did indeed enlarge a good deal upon the *enormity* of the crimes intended by the oath. But, in the present case, there is no question about the enormity of any other guilt than the guilt of high treason. The species, and not the enormity of the crime, is first to be considered. The great-

est atrocity attending a crime which is not treason, will not convert it into treason. I must also take notice, that my learned friend, in his endeavours to magnify the guilt of this oath, had recourse to a new doctrine, expressing at the least his own doubts, as to the legal presumption of innocence in favour of a prisoner on his trial, and even denying that there is any such presumption. But even this extraordinary doctrine, though it were sound, would not, by depriving the prisoner of the legal advantages of his defence, convert the crime alleged, how aggravated soever, into a crime of a different species not alleged, or change the sort of criminality appearing from the oath now in question, into a criminality of a different species, not appearing from the oath. But I am amazed at the boldness, as well as at the novelty of denying the legal presumption in favour of innocence, which, till now, I never heard disputed; and I never was present at any criminal trial in which it was not admitted, either in express terms, or by evident implication, in every argument on either side in the proceeding.

It may be admitted, however, that the oath, though it is not liable to the unfounded and imaginary construction averred by the public prosecutor, was mischievous and criminal in its tendency; insomuch, that the parties to it might have been punished with some severity, under an indictment accurately setting forth the true nature of the offence. But the public prosecutor, instead of bringing the merits of the case to a fair trial, in which it is probable that the general good wishes of the community would have attended him, has not only charged the prisoner with a treasonable intent, but, in the support of this untenable hypothesis, has imputed even to such parts of the oath as are evidently innocent, or at least entirely free of treason, the whole atrocity of that offence. This attempt is hardly a subject for argument. Neither the endeavours to form a brotherhood of affection, nor the endeavours to obtain universal suffrage and annual parliaments, nor the secrecy, were treasonable in themselves. Some of the objects in view were even legal and innocent. A brotherhood of affection is, if I understand it, at least innocent, and it may be a useful and meritorious institution. A plan for obtaining universal suffrage and annual parliaments, is held, by many, to be inexpedient in its nature, while others think it not only expedient, but absolutely necessary. That endeavours may be legally used for obtaining such a change in the law of Parliament, will not be denied by any person who understands what is meant by the statement. And though very illegal means may be

used for producing so important a change, it does not follow, either that every means used for that purpose are illegal, or that the means, if illegal, must necessarily be treasonable. A resolution of secrecy would not have been illegal; and, though I readily allow that an *oath* of secrecy was at least questionable, the absurdity of charging it as a treason, or as being an oath to commit treason, must be manifest.

I must repeat, that without any prejudice to the prisoner's defence against this indictment, it may be supposed, that the oath had an illegal or criminal intent. The question upon the nature of the oath is not, whether it imports an obligation of an illegal or *criminal* nature? but whether, as it is recited in the indictment, it is an oath purporting or intending to bind the person taking the same to commit the crime of high treason? This is the proper state of the question, which ought to be kept steadily in view. And here it may be observed, that the meaning of the oath can only be discovered from its own terms; and that, as the true meaning is disputed, the same rules of interpretation must be applied that are applicable in other cases, to ascertain the meaning of words; keeping always in view, not only the general rules of interpretation, but those rules, the operation of which is more confined, and which apply more particularly to words in which a criminal intent is alleged.

In such a question as this, the prisoner is entitled to expect, that suspicions and conjectures are to be laid out of consideration; and especially those which do not originate from the terms of the oath itself, but from extraneous circumstances, or allegations as to the views of the person who administered, or the person who took it, or those connected, or alleged to be connected with them in the same undertakings. For if the oath is an offence indictable on the statute, it is so indictable merely in respect of its own proper meaning, or the meaning of its words, and not in respect of any intent in the parties to it, or their supposed confederates, not appearing from the words of the oath, and far less, can suspicions or conjectures as to the intent of such persons, be admitted under this indictment. That an oath indictable under the statute, purports or intends to bind the persons taking the same to commit the crime of high treason, may be proved in two ways; either by the plain and direct words of the oath, where it binds the party, clearly and unequivocally, to do that which it is high treason to do; or where it binds them to do that, which, by plain and reasonable inference, is an overt act of treason. But,

as suspicions and conjectures, drawn from circumstances that are extraneous to the oath, are inadmissible under an indictment on the statute, so, by parity of reasoning, it is equally clear, that suspicions or conjectures, even where they are drawn from the words of the oath, and from nothing else, are inadmissible. For it must be proved, and not merely suspected or conjectured, from the terms of the oath, that it purports an obligation to commit high treason. Demonstration is required, and not mere suspicion or conjecture; which are not limited by the truth, but get into the mazes of human ingenuity. Wherever these are admitted, the conclusion must be uncertain and arbitrary. This is not authorised by the statute libelled on; which inflexibly requires an oath purporting or intending to bind the person, taking the same, to commit treason, and thus evidently requires a certainty arising from the terms of the oath, without a mixture of guesses, suspicions, or conjectures, how plausible soever they may be.

And further, it may be remarked, that if certainty is required as to the import or meaning of the oath it is not sufficient to allege against the prisoner, that an oath, in such terms, may have been misunderstood by the person taking it, and supposed to be an obligation to commit high treason, though it really was not so. For ignorant or illiterate persons may very easily misconceive the meaning of words; and even those, who are better informed, may so misconstrue them, as to think their meaning is bad, when, in reality, it is innocent; or, if the meaning is criminal, to think it is treasonable, when it is not treasonable, and when no such meaning was in the mind of other persons to whom the words were used. Under an indictment of this kind, therefore, whether against the party who administered, or against the party who took the oath, the misunderstanding or misconstruction of other persons can signify nothing. It ought to be considered, whether the terms of the oath do necessarily and unavoidably purport an obligation to commit high treason; and the prisoner is even entitled to maintain, that if the oath can be understood in any other sense, with a probability that it was so understood by him, or by the person taking it, there was no obligation to commit high treason, such as the statute means, and there is no relevancy in this indictment.

And this may be inferred even from the terms of the indictment itself, in which it is alleged, that the oath was administered wickedly, maliciously, and, strange to say, *traitorously*. The terms wickedly and maliciously, were necessary to denote the criminal quality of the act, or the

wicked intent of the accused; and they exemplify the principle, that no person is to be held as a criminal, where he acted without a criminal intent.

In this case it is not alleged against the prisoner, that there was any treasonable or other wicked purpose, or indeed *any* particular purpose in view, when the oath was administered. No treasonable, or seditious, or otherwise illegal association is so much as mentioned or hinted at in this indictment. The allegation of the public prosecutor is confined as it ought to be, to the nature of the oath itself, the words of which are set forth as being sufficient evidence of their own criminality, without the aid of extraneous circumstances. Here, then, the prosecutor is at issue with the prisoner, upon the question, whether this oath does plainly and necessarily import an obligation to commit high treason, or is equally criminal with an obligation, in terms express and direct, to compass the death of the King; to levy war against him; or in any other terms, expressing, without ambiguity, an obligation to commit high treason, or to commit a crime that is punishable in terms of this act of parliament. That the oath contains no such obligation, in express or direct terms, is sufficiently obvious. And it is only by a forced and unnatural construction of the words, that the prosecutor has attempted to make out, that there is in the oath, not an express obligation to commit high treason, for that seems to be out of the question, but an obligation to be collected from suppositions of implication and presumption derived from different parts of the oath, in which, not merely a wicked intent, but the most wicked of all intents on the part of the prisoner is taken for granted, without any evidence or any reason whatever. This is not dealing fairly with a question of this kind. Admitting that all the words of this oath are to be taken into consideration, and combined, where they are capable of being combined, for the purpose of ascertaining whether there exists in the whole, or any part of the oath, a criminal intent, of that species that is alleged in the indictment; it is evident that the conclusion for, or against the prisoner, ought to be gathered from the reasonable inferences or presumptions, and not from exaggerated suppositions of wicked intention, for which there is no foundation in the terms of the oath.

But if this is the nature of the question before the Court, it seems to be of some importance to remark, that a decision upon the relevancy of the indictment is in truth a decision upon the merits of the case, if it shall be proved that the prisoner

did actually administer the oath; for your Lordships cannot sustain the relevancy of the indictment, without being of opinion, that the oath purports and intends as the prosecutor says it does.

Your Lordships will therefore pause before you pronounce an interlocutor sustaining the relevancy of this indictment; for by so doing, you just, in so many words, give your opinion that the oath has the bad meaning assigned to it, and can have no other meaning. In other words, you pronounce a verdict against the pannel—and yet it must remain a question for the jury, if it shall be proved that the oath was administered—Whether the words of the oath, imported the statutory offence or not? In every other case, you sustain the relevancy of an allegation, of which the import is clear and unequivocal; but by following a similar course here, you confirm the prosecutor's interpretation of an act, in itself ambiguous, to say the least of it; and, in fact, exhaust the main question as to the guilt of the pannel.

And therefore, unless your Lordships shall be satisfied that the oath necessarily imports the obligation alleged, you must reject the indictment upon the relevancy. For, if the oath do not necessarily import an obligation to commit high treason, the pannel administered that oath without being guilty of the crime alleged against him.

And under these circumstances, the judgment of your Lordships ought, according to the common rules, to be in favour of the prisoner. Where there is any doubt, it operates in favour of the pannel. He is presumed to be innocent until he is proved to be guilty; and that presumption operates upon every doubtful case. *In dubiis benigniora præferenda sunt.* And this maxim applies very strongly to the construction of words alleged to be of a criminal nature. My learned friend applied it, with his usual ability, to the words in the oath respecting the plan of brotherhood, annual elections, and universal suffrage, and the support of these objects by physical strength.

We are told that these parties had very criminal purposes in view; and therefore, it is to be presumed that nothing innocent was in the oath. But I can never admit the justice of such reasoning. Where a project or engagement of any sort, which does not of itself import that violence is to be used, is to be supported with the whole of a man's power, influence, and even strength, it is to be understood, unless there are plain words from which the contrary should be inferred, that it binds him only to use his utmost lawful endeavours, and for a lawful object. Upon the principles of the prosecutor in

this case, any engagement whatever may be construed as an obligation to commit treason.

After reciting the terms of the oath in this indictment, the prosecutor proceeds to put a construction upon them which is evidently faulty. It is faulty in many respects. The allegation is, that the oath purports an obligation to commit high treason. And how is the supposed high treason to be committed? "By effecting, by physical force, the subversion of the "established government, laws, and constitution of this king-"dom, and especially, by obtaining annual parliaments and "universal suffrage, by unlawful and violent means." This is the allegation. The relevancy of this part of the indictment stands upon the nature of that allegation.

Now, in cases of high treason, the averment must be, that a certain *specific treason* was committed—it is not sufficient to say generally that high treason was committed. This proposition cannot be, and it has not been, disputed where the crime of high treason itself is charged. But we are told that this is not a trial for high treason. This, however, is nothing at all to the purpose, for the *ratio legis* is equally applicable here, as it is in the case of trials for high treason. Supposing this were a trial for high treason, the averment in the indictment as to the nature of the oath would not be sufficient, because it does not describe any particular species of high treason—it merely describes a common law treason, which was abolished by the statute of Edward III. Ever since that salutary act was passed, treason has stood entirely upon statute. Every prosecution for treason must be founded upon a particular statute—and it must set forth, specifically, the nature of the treason that is charged.

And, although this is not a trial for high treason, but a prosecution against the pannel for having administered an oath for committing high treason; it is evident that the pannel is in the same case as if it were a trial for high treason. For, if justice requires that the treason shall be specified in a trial for treason, the same principle must require, that in a charge that a criminal oath was administered, the nature of the crime to which the oath refers must be stated, for otherwise the accused has no notice as to the nature of the crime for which he is brought to trial.

If it had been an obligation to commit murder, would it have been sufficient to say, that it was an obligation to commit a crime? Certainly not. And here, since it is said to be an oath binding to commit high treason, the particular kind of high treason ought, for the same reason, to be specified, as there are many different kinds of treason.

So far we get on in our way, then.—The kind of treason that was to be committed should have been specified, for treasons are distinguishable from one another, as much as murder from robbery, or any other crime. He who compasses the death of the King, is guilty of one species of treason; he who levies war against him, is guilty of another kind of treason. In the indictment before us, we have no distinction of treasons; we have just an allegation of an obligation to commit treason. The indictment does not mention any one of the statutory treasons.

A complaint was made of my learned friend, that he read only the general words of the clause in the indictment which comes after the recital of the oath, and not the special words which follow the words read by him. They say he read, "Which oath, or engagement, or obligation to the foregoing "purport, did bind, or did purport, or intend to bind, the "persons taking the same to commit treason, by effecting, by "physical force, the subversion of the established government, "laws, and constitution of this kingdom." And, they say, that he should have added, "and especially by obtaining an-"nual parliaments and universal suffrage, by unlawful and "violent means." But the omission was altogether immaterial. The omitted words do not contain a charge of any specific treason.

It may be, that the treason meant by the public prosecutor was to be committed by levying war against the King. But still it was necessary to let us know by the indictment that such was the prosecutor's meaning, for the oath does not so explain itself, as to import, with certainty, an obligation to commit any crime known in the law.

The words in this part of the minor proposition do contain little more, and nothing different from the old charges of treason, which were long ago abolished by act of Parliament, 25th of Edward the III. The charge of a common law treason is not known at the present day; and we little expected to have found such a one in any indictment before your Lordships. To prove this, we referred to the authority of Sir Matthew Hale. Among other singularities in Mr. Home's argument, he denied that this was an authority.

Mr. Drummond.—You are mistaken, I did not say so.

Mr. Clerk.—I think you termed his work a faulty performance; and said he was very little to be followed in a question of this kind, and yet, that he was the person whom we called the great father of the treason law. It is hardly worth

while to inform your Lordships, that Mr. Home is mistaken as to the work of which he speaks. Hale's Summary of the Pleas of the Crown, is not a book of authority. But his History of the Pleas of the Crown is a different work, and of the highest authority. Mr. Home founded his observation on a passage in the report of Sir John Wedderburn's case in Judge Foster's work. But if he had read the very next sentence, he would have seen the distinction pointed out between the Summary and the History. I shall take the liberty of reading a passage from the original preface to the History of the Pleas of the Crown.

"Some years ago there was published a treatise entitled "Pleas of the Crown, by Sir Matthew Hale; but this was on-"ly a plan of this work, containing little more than the heads "or divisions thereof, concerning which the editor in his pre-"face expresseth himself thus: He (our author) hath written "a large work, intitled an History of the Pleas of the Crown, "wherein he shows what the law anciently was in these mat-"ters; what alterations have from time to time been made in "it; and what it is at this day. He wrote it on purpose to "be printed, finished it, had it all transcribed for the press in "his lifetime, and had revised part of it after it was transcrib-"ed."

I understand, that a vote, desiring the executors of Hale to print the great work on the Pleas of the Crown, to which we have referred, was passed by the House of Commons after his death, a most honourable testimony certainly to the author. And Judge Foster himself, talking of an argument of Hawkins', calls him "a good modern writer on the crown "law, the best we have except Hale." I need say nothing more to support the authority of Hale; and if I were in any other place where his work is better known, it would be unnecessary to shew, that he is the first of all authorities in questions of treason. His opinion has been over-ruled in one or two points; but his authority is of the highest class.

It is true, that in the history of common law treasons, we find charges of accroaching the royal power, and other vague charges of treason, such as that now before us. But all these have been long exploded. There have been no such charges preferred during the last or present century.

It is very remarkable, that, in one of the instances—a most singular instance, in which a charge of that kind was made, and carried into effect—I mean upon the trial of the great Earl of Strafford, who was charged with this general common law treason,—an endeavour to subvert the fundamental laws. So violent was the House of Commons, so timid the House of

Lords, and so weak the Sovereign, that a bill was past charging him almost in the same terms that are employed by the public prosecutor in this case. The bill of attainder states, that the Commons have "impeached Thomas, Earl of Strafford, "of high treason, for endeavouring to subvert the antient and "fundamental laws and government of his majesty's realms of "England and Ireland; and to introduce an arbitrary and "tyrannical government against law, in the said kingdoms," &c.

And the act of Parliament for reversing the attainder, proceeds in the recital: "Whereas Thomas, late Earl of Straf-"ford, was impeached of high treason, upon pretence of en-"deavouring to subvert the fundamental laws, and called to a "public and solemn arraignment and trial, before the peers "in Parliament, where he made a particular defence to every "article objected against him, insomuch that the turbulent par-"ty then seeing no hopes to effect their unjust designs, by any "ordinary way and method of proceeding, did at last resolve "to attempt the destruction and attainder of the said Earl, by "an act of Parliament, to be therefore purposely made, to con-"demn him upon accumulative treason, none of the pretended "crimes being treason apart, and so could not be in the whole, "if they had been proved, as they were not."

I need enlarge no further on this subject. Your Lordships see that Lord Strafford was attainted on common law constructive treason, expressed and described in the same vague terms as in this indictment, and contrary to the statutes; and that the reversal proceeded on the ground of the illegality of such charges.

It is therefore impossible to sustain this part of the indictment. It should have been better expressed, had it been a charge of treason; and where the charge is, that an oath was administered to commit treason, the treason must be described as specifically as where treason itself is prosecuted. There is no difference between the two cases. Where a trial is for high treason, the treason must be described. If the trial be for administering an oath to commit high treason, the pannel is in danger if you do not describe the treason, or if you describe it as a common law treason. Is he not in the same danger as to the felony, that he would have been as to the treason itself? The same equity applies, and the same regularity of proceeding is due to him in both cases.

You may remove the oath from the treason by many steps. Suppose a charge made, that one sent another to administer an oath to a third person, or that there were several such steps, till at last you came to the charge that an oath to commit high

treason was administered, are you not under a necessity at least to describe what was done? It is all one whether you are to be tried for committing the crime, or for sending another to commit it. Had the oath been to commit murder, the murder must be set forth in the same way as in an indictment for murder; had it been to commit theft—in the same way as in an indictment for theft; and the same reason applies in all the cases.

The reason is, it is necessary that the pannel should have notice of the crime that is to be charged against him. The charge of administering an oath to commit treason, should specify the treason. If a full description of what is charged against a pannel is not given, he has nothing to put him on his guard. I need hardly enforce this upon your Lordships' consideration; it has been so long established by practice, that the prosecutor must detail in the indictment every thing he knows.

The prosecutor has not done so here. He has given no account of the *corpus delicti* in this case. It is only stated generally to be the administering an oath binding to commit treason. He should have set forth the kind of treason in legal terms, so that my client might understand it. And, in point of fact, we supposed it to be another sort of treason that was meant, and not that which Mr. Home Drummond has told us it is.

I submit to your Lordships, that this, instead of being a description of treason, is just one of those loose constructive allegations that the law has reprobated for many centuries.

What is the construction? Let us look at the oath again. This oath is held by the public prosecutor to be an oath to commit violence. Unless it is an oath to commit violence, he knows he has no case. It is held by the public prosecutor, to be an oath to commit violence by attacking others; and not merely to use strength in defence against the attacks of others. I am sure, that does not appear upon the face of the oath. It says, I will support the same, either by moral or physical strength; but it does not purport to bind any body to employ strength, either lawfully or unlawfully, in attacking other persons. But the public prosecutor takes all this for granted, that the strength to be used is not merely to be used in defence, but also in attacking others. It is not said in the oath, whether the physical strength is strength of body, or strength of mind, or the strength which arises from wealth, or from numerous friends, connexions, or dependents No explanation is given as to what sort of physical strength it is. But it is taken for granted by the public prosecutor that it means strength of body. It is farther taken for granted, that this

strength is to be used in combination with that of other persons, although there is not the least ground for that construction of the oath; for it is the oath of a person in the singular number, and there is no reference in it to any exertion of strength in combination with other persons.

It is taken for granted, that this physical strength or force is to be employed not only where it may be lawfully employed, but also where it must be unlawfully employed; and this, as a proposition necessarily arising from the terms of the oath when you take the different clauses altogether. The oath of secrecy, it is said, is intended to cover unlawful purposes; these, it is next inferred, must be violent, treasonable, not purposes of defence, but of attack—not by one individual, but by a great combination of persons, whose attacks would amount to the specific treason which is committed by levying war. Farther, it is taken for granted, that the prisoner, along with the supposed persons to be engaged with him, are to use the arms of war, though there is nothing in the words of the oath to justify that *postulatum*. The oath is cautiously worded, and you will not have the worse opinion of it for that. The moral and physical strength are to be used as the case shall require; and every thing is to be taken for granted upon these words. It is to be taken for granted, that the case would require the employment of moral and physical strength; that not only physical strength was to be used, if the case lawfully required it, but, if it required it, unlawfully. In short, there are about fifty different constructions, all in this way taken for granted, in order to make out this to be an oath to commit treason.

I ask your Lordships, then, whether this is not a constructive treason that is alleged by the public prosecutor, more violent, more uncandid, more unjustly alleged, than ever was alleged against Lord Strafford, or any individual who ever suffered the greatest injustice. Could such an allegation ever have been supported at any period of the English government? Can any one case be pointed out, in which so many constructions were necessary, so many malignant purposes to be taken for granted, in order to make out treason? The oath may be highly criminal; but the question is, whether it is so to the extent of being an obligation to commit treason? It is not; and, therefore, the indictment of the prosecutor is irrelevant.

Two other points to which I have not hitherto adverted, are of considerable importance in the present case.

It is hardly necessary for me to enforce what was stated to your Lordships by Mr. Grant, with respect to the proceedings upon this trial, on the supposition that the indictment in-

volves a charge of treason. I shall assume the different points that were stated by Mr. Grant. They were stated from the English law books; and no answer or contradiction has been given to them. Let us therefore see the inference to be fairly drawn from his argument.

It is true, this is not a trial for treason; but if a charge of high treason is implied or involved in the indictment, it is a case which must be tried according to the treason laws, if a similar case would be tried in England according to these laws. For the treason laws in both countries being the same, every case which has the benefit of these laws in England, must have the benefit of the same laws in Scotland. To deny this proposition, is to deny that the treason laws are the same in the two countries. The law of treason has been imported (if I may use the expression) from England into this country. It may have its advantages and disadvantages. I shall not say that the law administered by your Lordships' predecessors was not as good as the law of England as to treason. It is enough to say it was different; and that it was considered to be for the benefit of the two kingdoms that their laws should be the same on all points of treason.

Mr. Home did not seem to understand what we have to do with that law. Your Lordships, however, will understand this. The law of Edward III. and all the other laws concerning treason, I apprehend, necessarily comes to be considered by your Lordships, in consequence of the act of Parliament declaring, in broad terms, that the law of treason shall be the same in both countries. We must therefore inquire, when a crime is charged, whether it is connected with treason. A charge of theft is not connected with it. But here is a charge of administering an oath to commit high treason. That certainly has some connection with treason itself. But, in consequence of the terms of the act of Parliament on which the indictment is raised, you are authorised to go on with the trial of the statutory crime. But suppose high treason is charged, or, in making inquiry into the terms of the indictment, it is found to involve a direct charge of high treason, you have been told, upon good authority, that, if brought into the Court of King's Bench, the Court would observe that there was a charge of high treason, and that the party should be tried in the way, and according to the form of trials for high treason. I ask your Lordships if it is possible to dispute that such is the rule of the law of England; and it cannot be disputed that the rule is also part of the law of high treason in this country; for the law declares treason shall be tried and punished in the same way in the two countries.

According to my friend, Mr. Home, it is neither to be tried nor punished here as in England. *First*, he says, This indictment is to be tried by your Lordships according to your ordinary forms of procedure; and, *secondly*, The crime is not to be tried or punished as high treason. But, if the law of England has been truly stated to me, you will consider the charge brought before you as one of high treason, and follow the same course as would be adopted by the Court of King's Bench. If you are not bound to do so in this case, in what case would you be bound to do so? What applies to one case of high treason, must apply to another.

Then, supposing the general rule to be, that the charge of an inferior crime must merge in a charge of high treason, let us see how it appears that the crime charged in the indictment does not merge in high treason. I am assuming treason as alleged; and I shall shew you that it is alleged in this indictment.

By the act of the 52d of the King, it is declared, that the administering an oath purporting to bind persons to commit treason shall be a felony, and punished as such. If the general rule is, that the lesser crime merges in the treason, the lesser crime of administering the unlawful oath should merge in the treason in every case, where the crime alleged amounts to treason. But there are many cases in which the crime alleged does not amount to treason, and there are therefore various cases to which the act of the 52d of the King applies; for, although the statute declares the criminal act of administering an oath binding to commit treason, to be punishable as a felony, without benefit of clergy; yet, in a subsequent part of the act, it is declared, that if not tried and punished as a felony, it may be tried and punished as a treason. This is declared by the last clause of the statute.

An oath may be administered purporting to bind to commit high treason, without necessarily involving the person so administering the oath in a charge of high treason. There are many ways of committing high treason. An oath that purports to bind to commit high treason, does not necessarily involve the crime of treason itself. So that here there may appear two sorts of cases to which the act may or may not apply. There may be the case of an oath administered, purporting to bind to commit treason, and no treason at all be chargeable against the parties; and another case, in which, such an oath being administered, the very administration of the oath is an act of high treason,

There are cases of both sorts, and it would be endless to enumerate them all.

The law of England must be administered in all cases of treason tried in Scotland. When a crime is charged against an individual under a lower denomination, and it appears from the facts, as stated in the indictment, or from the evidence in the course of the trial, that the case is one of treason, the crime of the lower denomination which is charged, merges in the crime of high treason. I cannot make that point clearer than it has been made by Mr. Grant, and I do not mean to go over it again. It seems to be part of the law of England as to *all* crimes, and it is *here* the law as to the crime of treason. In our law, this is not the case as to *other* crimes than treason; and we have many instances in which offences are tried by lower denominations, which might have been tried under higher denominations.

Here a difficulty meets us which may be soon disposed of. We are told, that though, by the law of England, this merging takes place, yet that the law of Scotland is otherwise; and we are asked, What have we to do with the law of England here? Are we not to follow our own law?—We do follow our own rules except in cases of treason. If we are asked, what have we to do with the law of England? I answer, we have to do with it, because it is our law of treason.

And here I beg leave to remind your Lordships of the well-known decisions in the civil court on the plea of prescription founded on the English statute passed in the 5th year of Queen Elizabeth. It had formerly been decided by the Court of Session, not long after the Union, that the 5th of Elizabeth was no part of the law of Scotland, and that the limitation of penal actions in the case of usury could not be pleaded on it. Afterwards, it was decided, that the 5th of Elizabeth operated as a limitation to these penal actions, but the Court had again returned to its first opinion, and decided against the limitation. But, last of all, the Court, in various cases that occurred some years ago, found that the English statute was to be considered as a part of the law of Scotland, and was pleadable as a limitation of penal actions founded on the act of Queen Anne against usury. One of these judgments was affirmed in the House of Lords in the year 1814, and so the law is settled.

Here, then, was an English statute, which originally had no effect in Scotland, and which could not have been pleaded in any Scots penal action, if the act of Queen Anne had not made it a part of the law of usury in Scotland as well as in

England. It was introduced as part of the Scots law with much difficulty, contrary to former decisions, by a sort of equitable implication, without direct words. And yet we are told by the public prosecutor, in this case, that the most express words, giving us the benefit of the English law of treason, contained in a statute which must be considered as part of the treaty of Union between the two kingdoms, are to have no effect at all. For it is manifest, that, according to the doctrine of the public prosecutor, we have not the benefit of the English laws of treason in any one of those cases, in which the public prosecutor charges, under a denomination lower than that of high treason, a crime of so high a nature that it merges in treason. In other words, the public prosecutor may charge the most odious offences under any denominations he pleases; and, though the charges really amount to treason, the accused has no benefit from those laws, which, in every age, have been held so necessary to protect him against a charge of high treason.

Your Lordships will attend to another part of this statute of the 52d of the King, from which it will be plain to you, that it must have been the intent of the enactment, that, in the case either of the inferior crime stated in that act, of a felony with benefit of clergy, punishable by transportation; or, of the higher crime of felony without benefit of clergy, punishable by death, the true meaning of the act is, that the inferior crime should merge in treason wherever it appears. Suppose an express and positive oath taken to kill the King, or to commit any other horrible treason, and an overt act committed, if you were not to hold that the inferior crime, the felony of taking the oath, merged in the higher crime of treason, it would be in the power of the Lord Advocate, if a friend of the delinquent, to save him from a trial for the treason, by inflicting upon him only the punishment of transportation. Is it to be supposed, for one moment, that it was the intent and meaning of the act, that a person truly guilty of the most enormous crime that could be committed, should be entitled, by such a manœuvre, to escape the penalty of high treason? It is not conceivable. A friendly prosecution might be brought upon this act of Parliament in order to save a traitor's life. It is usual to speak of such a statute as this with reference to people of a low description. But an offence might be committed, under this act, by men of the greatest importance in the land; and, supposing that every thing that was said of the Rye-House Plot, or any the most treasonable in our history, should be realized, and circumstances ten times more aggravated should occur, is it to be conceived that the friends of such par-

ties should be able so far to protect them as to have their punishment made only transportation? To state such a thing is so absurd that you will not listen to it.

If such is not the construction of the act as to the taker of the oath, it is impossible to put that construction as to the administrator of it—for, from the beginning to the end of it, the same words are used as applicable to both. They are both in *pari casu*—only, that as to the one the penalty is death, and as to the other, transportation. And, therefore, upon this argument alone, I should be entitled to say, that if the administrator of the oath is charged with treason, he is entitled to be tried by the treason law.

There is another circumstance to be noticed. There is a clause at the end of the act which says, that if a party should be tried under this act, and should be acquitted, he should not be liable to be again prosecuted under the act for treason. It is not enough that he is brought under trial—he must be convicted or acquitted. That is a strong circumstance, as shewing the true meaning of this act.

The act is extremely for the benefit of the pannel in so far as he is only the taker of the oath. Let us see how it stands, if he were the administrator. I am sure there is no difference at all between the penalty of treason, and of felony without the benefit of clergy. It is much the same thing to a man whether he be hanged for treason or for any thing else. It is the punishment of death, and there is nothing more to be said about it. But there is a difference, whether a man is to be *tried* for treason, or for felony. Where he is to be tried upon the act, it is held that he is not to be tried by the treason law. He is not entitled to the great benefits that follow from the forms of trial for treason. It is more difficult to convict for treason, than for any thing else. In this part of the country the difference is not so great at first sight between the two modes of trial, because here, (of which the present trial is an illustrious example), the pannel has every benefit of counsel; and, by our law, although almost superseded in some instances, there must be two witnesses in order to establish a fact. I am sure, that, in England, the benefit of being tried by the treason law must be great. At the Old Bailey twenty or thirty may be tried in a short time for felonies, and a trial last only five minutes. A man there may be sent to the gallows before he knows his trial has commenced. Does it make no difference to him, whether he is tried in that method, or with all the benefit of counsel—and by a trial where the greatest struggles are made for the prisoner—from all which circumstances he has a much greater chance to escape? Does

it make no difference to him in this country that he can be indicted only by a grand jury—that, when he comes to be tried, he has peremptory challenges—and that, after all, the jury so selected must be unanimous before he can be convicted? No man in his senses would hesitate in his choice, between such a trial, and the ordinary form of trial, however well regulated it may be. In fact, the advantage of the treason laws in Scotland is still greater than it is in England, for persons who are accused of treasonable practices. Nor need I enlarge on a proposition so completely self-evident. There is, therefore, the greatest hardship to the prisoner, in being deprived of this mode of trial; and the provisions of the law for his safety, in a trial for treason, must not be lost sight of in the present question.

Under these circumstances, I contend, that if there is a charge of treason here, the trial ought to go forward according to the formalities provided for trials for treason in this country.

It is said, there is no trial for treason here. The prosecutor in saying so betrays inconsistency. There may be many oaths to commit treason, which are treason of themselves; and does not the charge in this indictment import, not merely that an oath was administered of the nature of an obligation to commit treason, but that an oath was administered that was in itself treasonable? I do not say that the oath itself was treason, or an oath to commit treason. I have been saying the contrary—that it was not an oath to commit treason, and I think it is far less an oath to commit treason by levying war against the King. But, as it is stated and expressed in the indictment, the prosecutor is not entitled to say it was not treason. He charges it as treasonable on the face of his indictment, and is he entitled to say he was mistaken? We cannot let him off in this way—for, *first*, he tells your Lordships that this oath was administered; *secondly*, that it was an oath binding to commit treason; and then, by way of explanation, he adds, that he means treason by levying war. Look at the words in the indictment itself. If treason is charged at all, it is such, that either to administer or take an oath to commit it under the circumstances alleged, is itself treason. It is a treason under the 36th of the King. The facts here, and the treason, are so loosely described, that it is merely a common law treason; but can any other meaning be put on the prosecutor's statements, than that there was not merely an oath to commit high treason, but that there was a conspiracy to levy war against the King, for the purposes expressed in the 36th of Geo. III.: and therefore the charge is treason. I thought I could have spoke

to this point in fewer words, otherwise I would not have troubled you with it at all. But, upon the whole of this case, the prosecutor must withdraw his charge, otherwise you must deal with it as a treason according to the law of England.

What remains is the other objection, pointed out by your Lordships; and, I apprehend, no answer whatever has been made on the part of the public prosecutor to that objection. It cannot be answered. I stated formerly, that an allegation of an oath binding the persons taking it to commit treason, is an absurd allegation, because no oath can bind a man to commit treason. But, further, it does not state the crime declared to be punishable by the statute, nor that mentioned in the major proposition of the indictment. It agrees with neither. The words, " as said is," will never cure such a monstrous absurdity. What are we told in answer to this? First, your attention was drawn to the " at least" clause, where it is said, that the oath is one " purporting to bind." The statute says, " purporting or intending;" and thus, the " at least" clause is also bad. So much the worse for the indictment; and I do not see why Mr. Drummond should have bestowed so much time upon that clause. But, how does he cure the other objection? He says that it is to these words, " the said oath, or " engagement, or obligation, to the said purport, binding the " persons taking the same to commit treason, as said is;" and that these words are surplusage. I deny they are surplusage. That is the very argument that has been so often overruled in cases, where an entail has been found insufficient, in consequence of the defect in the resolutive clause. In the case of Tillicoultry, and many other cases, the prohibitory clause was expressed in the most ample manner against selling, contracting debt, and altering the order of succession. But the resolutive clause proceeded in some such form as this, " In case of contravention, either by contracting debt, or al- " tering the order of succession, the contravener is to forfeit " the estate;" by which form of words, the case of selling was omitted in the resolutive clause; and there was no resolutive clause applicable to selling. And thus the heir of entail could not be prevented from selling the entailed estate. Against this conclusion, it was argued, that the resolutive clause contained general words, which were sufficient; and that the words " either by contracting debt," &c. were surplusage. But the Court of Session, and the House of Lords, held that the words were not surplusage; and, accordingly, that the resolutive clause applied only to contracting debt, and altering the order of succession, and not to selling. It was held that a resolutive clause, declaring that contravention,

here the question is not fairly raised as to the relevancy on the general grounds. The words employed in the minor proposition go to a limitation not warranted by the act of parliament. I am not called to say what is the effect of an oath that *binds* a person to commit treason. I am called to give my opinion on an oath which is averred to *purport* or *intend* to bind a person to commit treason. You have not before you an act of parliament that makes it criminal to bind to commit treason, but you have a statute which makes it criminal to administer an oath purporting or intending to bind to commit treason; and, therefore, it is impossible for the public prosecutor to say, here was an oath administered on four different occasions, binding to commit treason. That is not the offence which it was the purpose of this act to provide against. I have heard no answer to this objection, and therefore it is difficult to order informations on this indictment.

If the public prosecutor mean to charge only the capital felony mentioned in this act of parliament, he must employ language applicable to that capital felony alone, and the word "traitorously" ought not to be used in this indictment. It ought not to be in it, in order to raise the question which we are called upon to try.

I own, the part of the case upon which I should wish for information, is that as to the positive averment as to the rule of the law of England.

If the counsel for the prisoner are right, in stating what would be the rule of construction in England, and in affirming, that, on this occasion, the English rules and forms must be adopted, they must shew this in a manner to enable us decidedly to form our opinions on the subject. We do wish for every aid and assistance, if we are to be told that such a mode of proceeding would be adopted in the Court of King's Bench, and that it is our duty to follow the same mode of proceeding on this trial. When we are called upon to give our opinions upon the oath, we must proceed upon the general principles of construction, as to the import of the terms of it. I fairly confess, my difficulty is on the point which I have last mentioned.

Lord Gillies.—I wish the informations to be full, upon all the branches of the case.

The proceedings of the Court were entered on the record in the following terms:

"His Majesty's Advocate represented, that, since the "service of the indictment above mentioned, he had rais-

" ed and executed a new indictment against the P
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" therefore moved their Lordships to desert the die
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" M'Kinley, reserving to his Majesty's Advoca
" upon the second indictment, as accords.

(Signed) D. Boyle

And the second indictment being called, and
" being interrogated thereupon, he answered N
After parties procurators had been heard
length, upon the relevancy of the indictment
His Majesty's Advocate moved the Court
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to serve the pannel with a new indictment.
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" Justiciary, in respect of what is above
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(Signed) D.

" Thereafter a petition was presente
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Lord Gillies.—I wish the informations to be full, upon all the branches of the case.

The proceedings of the Court were entered on the record in the following terms:

"His Majesty's Advocate represented, that, since the "service of the indictment above mentioned, he had rais-

" ed and executed a new indictment against the pannel; " the diet whereof also stands adjourned to this day. He " therefore moved their Lordships to desert the diet of the " first indictment, reserving to him to insist upon the second " indictment as accords."

" The Lord Justice-Clerk, and Lords Commissioners of " Justiciary, in respect of what is above represented, desert " the diet of the first indictment against the said Andrew " M'Kinley, reserving to his Majesty's Advocate to insist " upon the second indictment, as accords.

(Signed) D. BOYLE, I.P.D."

And the second indictment being called, and " the pannel " being interrogated thereupon, he answered *Not Guilty*."

After parties procurators had been heard at very great length, upon the relevancy of the indictment,

His Majesty's Advocate moved the Court to desert the diet of the present indictment *pro loco et tempore*, as he meant to serve the pannel with a new indictment.

" The Lord Justice-Clerk, and Lords Commissioners of " Justiciary, in respect of what is above represented, desert " the diet against the pannel *pro loco et tempore*.

(Signed) D. BOYLE, I.P.D."

" Thereafter a petition was presented to the said Lords, in name of His Majesty's Advocate, craving a warrant for recommitting the said Andrew M'Kinley to the Castle of Edinburgh, till liberated in due course of law, which was granted accordingly.

THE

TRIAL

OF

ANDREW M'KINLEY,

FOR

ADMINISTERING UNLAWFUL OATHS.

Proceedings on the 23d June, 1817.

PRESENT,

The Right Honourable DAVID BOYLE, *Lord Justice-Clerk*,
LORD HERMAND. | LORD PITMILLY.
LORD GILLIES. | LORD RESTON.

Counsel for the CROWN.

The Right Honourable ALEXANDER MACONOCHIE of Meadowbank, *His Majesty's Advocate*.
JAMES WEDDERBURN, Esq. *Solicitor-General*.
HENRY HOME DRUMMOND, Esq. *Advocate-Depute*.

Counsel for the PANNEL.

HENRY COCKBURN, Esq.

LORD JUSTICE CLERK.—Andrew M'Kinley, attend to the indictment against you which is now to be read.

ANDREW M'KINLEY, present prisoner in the castle of Edinburgh, you are indicted and accused, at the instance

of ALEXANDER MACONOCHIE of Meadowbank, his Majesty's Advocate, for his Majesty's interest: That albeit, by an Act passed in the fifty-second year of his present Majesty's reign, entitled, "An Act to render more effectual an "Act passed in the thirty-seventh year of his present Ma"jesty, for preventing the Administering or Taking Un"lawful Oaths," it is *inter alia* enacted, "That every per"son who shall, in any manner or form whatsoever, admi"nister, or cause to be administered, or be aiding or as"sisting at the administering, of any oath or engagement, "purporting or intending to bind the person taking the "same to commit any treason or murder, or any felony "punishable by law with death, shall, on conviction thereof "by due course of law, be adjudged guilty of felony, and "suffer death as a felon, without benefit of clergy." And further, by section fourth of the said act, it is enacted, "That persons aiding and assisting at the administering of "any such oath or engagement, as aforesaid, and persons "causing any such oath or engagement to be administered, "though not present at the administering thereof, shall be "deemed principal offenders, and shall be tried as such; "and, on conviction thereof by due course of law, shall be "adjudged guilty of felony, and shall suffer death as fe"lons, without benefit of clergy, although the persons or "person who actually administered such oath or engage"ment, if any such there shall be, shall not have been tried "or convicted." And further, by section sixth of the said act, it is enacted, "That any engagement or obligation "whatsoever, in the nature of an oath, purporting or in"tending to bind the person taking the same to commit any "treason or murder, or any felony punishable by law with "death, shall be deemed an oath within the intent and "meaning of this act, in whatever form or manner the "same shall be administered or taken, and whether the "same shall be actually administered by any person or "persons to any other person or persons, or taken by "any other person or persons, without any administra"tion thereof by any other person or persons:" Yet true it is and of verity, that you the said Andrew M'Kinley are guilty of the said crimes, or of one or more of them, actor, or art and part: In so far as, you the said Andrew M'Kinley did, at secret meetings, and on other occasions, at Glasgow, and in the vicinity thereof, in the course of the months of November and December 1816, and January and February 1817, wickedly, maliciously, and feloniously administer, or cause to be administered, or

did aid or assist at the administering, to a great number of persons, to the amount of several hundreds, an oath or engagement, or an engagement or obligation in the nature of an oath, purporting or intending to bind the persons taking the same to commit treason, by obtaining annual parliaments and universal suffrage by physical strength or force, and thereby effecting the subversion of the established government, laws, and constitution of this kingdom, by unlawful and violent means; which oath or engagement, or engagement or obligation in the nature of an oath, was in the following terms, or to the following purport:—"In awful presence of God, I, A B, do voluntarily swear, That "I will persevere in my endeavouring to form a brotherhood of affection amongst Britons of every description, "who are considered worthy of confidence; and that I will "persevere in my endeavours to obtain for all the people "in Great Britain and Ireland, not disqualified by crimes "or insanity, the elective franchise, at the age of twenty-"one, with free and equal representation, and annual parliaments; and that I will support the same to the utmost of my power, either by moral or physical strength "(or force), as the case may require: And I do further "swear, that neither hopes, fears, rewards, or punishments, "shall induce me to inform on, or give evidence against, "any member or members, collectively or individually, for "any act or expression done or made, in or out, in this or "similar societies, under the punishment of death, to be inflicted on me by any member or members of such societies. So help me God, and keep me stedfast." And more particularly, (1.) at a secret meeting, held at the house of Hugh Dickson, then weaver in Abercromby Street, or Calton of Glasgow, or elsewhere at Glasgow, or in the immediate vicinity thereof, you the said Andrew M'Kinley did, upon the 20th day of December 1816, or upon one or other of the days of that month, or of November immediately preceding, or of January immediately following, wickedly, maliciously, and feloniously administer, or cause to be administered, or did aid or assist at the administering to Peter Gibson, John M'Lachlane, John Campbell, and Hugh Dickson, all present prisoners in the castle of Edinburgh, or to one or other of them, and to other persons, whose names are to the prosecutor unknown, an oath or engagement, in the terms above set forth, or to the same purport, or an engagement or obligation in the nature of an oath, in the terms above set forth, or to the same purport. And further, (2.) you the said Andrew

M'Kinley did, upon the 1st day of January 1817, or on one or other of the days of that month, or of November or December immediately preceding, at a secret meeting, held in the house of William Leggat, then change-keeper, King Street, Tradestown, in the vicinity of Glasgow, or elsewhere at Glasgow, or in the vicinity thereof, wickedly, maliciously, and feloniously administer, or cause to be administered, or did aid or assist at the administering, to the said Peter Gibson, John M'Lachlane, John Campbell, and Hugh Dickson; as also, to James M'Ewan, now or lately carding-master at Humphrie's Mill, Gorbals of Glasgow, and M'Dowal Pate, or Peat, now or lately weaver in Piccadilly Street, Anderston, in the vicinity of Glasgow, who, conscious of their guilt in the premises, have absconded and fled from justice; as also, to John Connelton, or Congleton, now or lately cotton-spinner in Calton of Glasgow, or to one or other of them, and to other persons, whose names are to the prosecutor unknown, an oath or engagement, in the terms above set forth, or to the same purport, or an engagement or obligation, in the nature of an oath, in the terms above set forth, or to the same purport. And further, (3.) you the said Andrew M'Kinley did, upon the 4th day of January 1817, or on one or other of the days of that month, or of November or December immediately preceding, at a secret meeting, held in the house of Neil Munn, then innkeeper and stabler in Ingram Street, Glasgow, or elsewhere at Glasgow, or in the vicinity thereof, wickedly, maliciously, and feloniously administer, or cause to be administered, or did aid or assist at the administering, to the said Peter Gibson, John M'Lachlane, John Campbell, Hugh Dickson, M'Dowal Pate, or Peat, and James M'Ewan; as also, to James Hood and John Keith, both present prisoners in the castle of Edinburgh, and to Andrew Sommerville, John Buchanan, and James Robertson, all now or lately prisoners in the tolbooth of Glasgow, or to one or other of them, and to other persons, whose names are to the prosecutor unknown, an oath or engagement, in the terms above set forth, or to the same purport, or an engagement or obligation in the nature of an oath, in the terms above set forth, or to the same purport. And further, you the said Andrew M'Kinley did, upon the 5th day of February 1817, or on one or other of the days of that month, or of January immediately preceding, at a secret meeting, held at the house of John Robertson, then innkeeper and stabler in Gallowgate of Glasgow, or elsewhere at Glasgow,

or in the immediate vicinity thereof, wickedly, maliciously, and feloniously administer, or cause to be administered, or did aid or assist at the administering, to the said James Hood, James Robertson, Andrew Sommerville, and John Buchanan, as also to James Finlayson, present prisoner in the castle of Edinburgh, or to one or other of them, and to other persons, whose names are to the prosecutor unknown, an oath or engagement, in the terms above set forth, or to the same purport, or an engagement or obligation in the nature of an oath, in the terms above set forth, or to the same purport. And you the said Andrew M'Kinley having been present, together with all or part of the persons above designed, at a secret meeting, held for the purpose of administering, or causing to be administered, the said oath or engagement, or for other purposes to the prosecutor unknown, at the house of Alexander Hunter, then changekeeper in the Old Wynd of Glasgow, on the 22d day of February, 1817, and having been there apprehended, conscious of your guilt in the premises, did assume the false name of John Brotherstone; and having been taken before Robert Hamilton, Esquire, Sheriff-depute of Lanarkshire, you did, in his presence, at Glasgow, on the 28th day of February, 1817, and on the 11th day of March, 1817, emit and subscribe two several declarations; and having been taken before Daniel Hamilton, Esquire, one of the Sheriffs-substitute of Lanarkshire, you did, in his presence, at Glasgow, on the 4th day of March, 1817, emit and subscribe a declaration; and having been taken before Hugh Kerr, Esquire, one of the Sheriffs-substitute of Lanarkshire, you did, in his presence, at Glasgow, on the 5th day of March, 1817, emit and subscribe a declaration; and having been taken before James Wilson, Esquire, Sheriff-substitute of the county of Edinburgh, you did, in his presence, at Edinburgh, on the 18th day of March, 1817, emit and subscribe a declaration;—all which declarations, being to be used in evidence against you at your trial, will, for that purpose, be lodged in due time in the hands of the clerk of the High Court of Justiciary, before which you are to be tried, that you may have an opportunity of seeing the same. At least, times and places foresaid, the said oath or engagement, or an oath or engagement in the foregoing purport, or an engagement or obligation in the nature of an oath, in the terms above set forth, or to the foregoing purport, purporting or intending to bind the persons taking the same to commit treason, as said is, was wickedly, maliciously, and feloniously administered, or caus-

ed to be administered, as aforesaid; and some person or persons did aid or assist at the administering thereof; and you the said Andrew M'Kinley are guilty of the said crimes, or of one or more of them, actor, or art and part. All which, or part thereof, being found proven by the verdict of an Assize, before the Lord Justice-General, the Lord Justice-Clerk, and Lords Commissioners of Justiciary, you the said Andrew M'Kinley ought to be punished with the pains of law, to deter others from committing the like crimes in all time coming.

H. Home Drummond, *A. D.*

LIST OF WITNESSES.

1 Robert Hamilton, Esquire, Sheriff-depute of Lanarkshire.
2 Daniel Hamilton, Esquire, one of the Sheriffs-substitute of Lanarkshire.
3 Hugh Kerr, Esquire, one of the Sheriffs-substitute of Lanarkshire.
4 James Thomson, clerk to John Drysdale, Sheriff-clerk of Lanarkshire.
5 Matthew Burns, clerk to George Salmond, procurator-fiscal of Lanarkshire.
6 John Leslie, clerk to the said John Drysdale.
7 Joseph Reid, writer in Glasgow.
8 George Salmond, Procurator-fiscal of Lanarkshire.
9 James Wilson, Esquire, one of the Sheriffs-substitute of the county of Edinburgh.
10 Archibald Scott, Procurator-fiscal of the county of Edinburgh.
11 James Currie, writer, Sheriff-clerk's office, Edinburgh.
12 Alexander Calder, Sheriff-officer in Glasgow.
13 Alexander Hunter, now or lately changekeeper, Old Wynd of Glasgow.
14 Marion M'Laren, or M'Lachlan, now or lately servant to the said Alexander Hunter.
15 John Robertson, now or lately innkeeper and stabler, Gallowgate, Glasgow.
16 Agnes Campbell, wife of Thomas Dow, now or lately steam-boiler-maker and smith at Girdwood and Company's foundry in Hutcheson Town, in the vicinity of Glasgow.

17 Janet Rentoul, now or lately servant to Neil Munn, now or lately innkeeper and stabler in Ingram Street, Glasgow.
18 Alison Wilson, now or lately servant to the said Neil Munn.
19 Matthew Fyfe, now or lately spirit-dealer in Wilson Street, Glasgow.
20 Jean Boyd, wife of the said Matthew Fyfe.
21 William Leggat, now or lately changekeeper in King Street, corner of Centre Street, Tradestown, in the vicinity of Glasgow.
22 John Mitchell, weaver, now or lately residing in Wilkie's Land, Charles Street, Calton of Glasgow.
23 Hugh Dickson, present prisoner in the castle of Edinburgh.
24 Peter Gibson, present prisoner there.
25 John M'Lachlane, present prisoner there.
26 James Finlayson, present prisoner there.
27 John Campbell, present prisoner there.
28 James Hood, present prisoner there.
29 William Simpson, lately prisoner in the castle of Edinburgh, and now or lately changekeeper in Main Street, Anderston, in the vicinity of Glasgow.

H. Home Drummond, *A. D.*

LIST OF ASSIZE.

County of Edinburgh.

David Gray of Snipe.
John Thomson of Burnhouse.
George Jeffrey, grocer in Dalkeith.
Richard Muschet, merchant there.
5 James Mutter, farmer, Longside.
James Niblie, farmer, Easter Cowden.
David Thomson, farmer, Wester Cowden.

County of Haddington.

John Anderson of Whitburgh.
Thomas Mitchell of Westbarns Mains.
10 Charles Crawford, farmer, East Fortune.
Mark Turnbull, farmer, Upper Bolton.
James Wilson, farmer, Bolton.

County of Linlithgow.

William Wilkie of Magdalens.
William Shillinglaw of Boghead.

Andrew Mitchell, farmer, Kinneil Kerse.
John Ross, farmer at Borrowstown.
John Thomson, farmer at Inneravon.

City of Edinburgh.

Richard Johnston, banker in Edinburgh.
James M'Kenzie, goldsmith there.
Robert Green, watchmaker there.
Robert Slater, dye-cutter there.
William Neilson, painter there.
James Yule, baker there
Andrew Grierson, tailor there.
Patrick Main, painter there.
John Lauder, merchant there.
Samuel Hopperton, grocer there.
John Brown, merchant there.
Robert Mitchell, merchant there.
William Lockhart, tinsmith there.
John Sinclair, seed-merchant there.
William Scott, pewterer there.
Alexander Johnston, ironmonger there.
George Gray, baker there.
Thomas Edmonstone, ironmonger there.
William Murray, baker there.
John Smith, spirit-dealer there.
Thomas Hunter, merchant there.

Town of Leith.

John Sharp, wine-merchant in Leith.
Archibald M'Dowall, merchant there.
James Ogilvie, wine-merchant there.
Robert Strachan, merchant there.
Robert Sanderson, cooper there.
Robert Brunton, merchant there.
John Calder, grocer there.

D. Boyle.
Geo. Ferguson.
David Douglas.

Lord Justice Clerk.—What do you say to this indictment? Are you guilty or not guilty of the charges contained in it?

Andrew M'Kinley.—Not guilty.

Lord Justice Clerk.—When the case was formerly before us, a full and very able discussion took place. There

is some variation between the present and the former indictments, but the crime charged in them is one and the same; and, therefore, the resolution then formed, your Lordships will now carry into effect, by ordering informations on the relevancy of the indictment.

Lord Advocate.—I think it proper to state, that my object is to bring this case before a jury as speedily as possible; and knowing, from what was formerly thrown out, that when an interlocutor should be pronounced, your Lordships would direct informations should be given in, I have had the information for the Crown prepared, and actually printed, and it will be ready to be thrown off without delay. For the purpose of dispatch, and in order that no delay may take place in bringing on this trial, I crave your Lordships to direct, that the information for the pannel shall be ready within a short time from this date.

Lord Justice-Clerk.—As there was a very full argument on the relevancy in the case of Edgar, where the indictment was similar to the indictment served on this pannel; and, as the second pleading, followed out the same argument as the first, we can have no difficulty in ordering the informations to be given in at an early period.

Mr. Cockburn.—Mr. Moncrieff, notwithstanding his numerous avocations, has undertaken to write the information for the pannel. In fixing the period for giving in the informations, you will consider he has not yet seen the paper given in for the other party. The last diet was about three weeks ago; so that the prosecutor, knowing the nature of his indictment, has virtually had three weeks to prepare his information. Therefore, as three weeks have been taken by the Crown counsel, you must give us an equal period to prepare the information for the pannel.

Lord Justice-Clerk.—The indictment was served three weeks ago.

Lord Advocate.—Your Lordships will also observe, that the parties heard each other's pleadings. I am happy, both for the sake of the pannel and the law, that Mr. Moncrieff is to write the information on the other side. But, if Mr. Moncrieff cannot, from his other avocations, accomplish his task within a short period, there are other seven counsel for the pannel, of the first eminence at the bar, and surely, by

this great band of counsel, the paper might be prepared without delay.

Mr. Cockburn.—If each took a page in turn, it might soon be done. There are three counsel for the Crown, and, from the statement we have heard, I presume each may have taken a week in the preparation of their paper. But, as Mr. Moncrieff is himself to write the whole of the information for the pannel, three weeks must be given to him.

Solicitor-General.—There are eight counsel for the pannel, and when they select a particular one from among themselves to write the information, they are not entitled to get delay on account of the numerous avocations of the counsel so selected. The circumstance, therefore, of that counsel's avocations, cannot be listened to as any excuse for asking delay in preparing the information for the pannel.

Lord Hermand. — I cannot distinguish between one counsel and another in doing his duty.

Lord Justice-Clerk.—If this were the first time of ordering informations on the indictment, your Lordships would naturally give full and competent time to prepare them. But this case stands very particularly situated. We have had most full and able debates upon the relevancy; but, from the importance of the case, you thought it right to have the argument stated in writing. The Court does not wish more verbal discussion; and, the only question is, now that the diet has arrived, What is a competent time to give for preparing the information? The pannel has, again and again, been brought here, from circumstances which we could not help; and we are not to allow the case to be protracted. Let the information for the pannel be given in ten days hence, or this day fortnight.

Mr. Cockburn.—From Mr. Moncrieff's situation, that is giving him no time at all. He cannot begin before Wednesday, as he has not seen the other parties' pleadings. Four or five days must pass before he does so, and then he has not four or five days to write.

Lord Hermand.—It is a very different thing, after hearing these pleadings, to write the information, from what it would have been had these not taken place.

The LORD JUSTICE-CLERK mentioned, that the former debate had been taken in short hand, and furnished to the judges.

LORD GILLIES.—The shortest time possible should be fixed upon.

LORD HERMAND.—I think that better for the pannel.

LORD GILLIES.—We are to consider the informations this day fortnight. If we find that inconvenient, by a short minute, the consideration can be delayed till the Wednesday following.

Mr. COCKBURN.—Is it to be this day fortnight or three weeks? The trial might be postponed a week.

LORD GILLIES.—The collection of the witnesses and jury should be considered.

LORD JUSTICE-CLERK.—I have no wish to press my own opinion, if any of your Lordships think differently.

LORD RESTON.—I think ten days sufficient to allow for the information; but I have no objections to longer time being granted. I have no objection to an indulgence to Wednesday fortnight on both sides.

INTERLOCUTOR.

"The Lord Justice-Clerk and Lords Commissioners of "Justiciary, ordain parties procurators to give in informations "upon the relevancy of the indictment, to the clerk of Court, "in order to be recorded; the prosecutor to give in his infor- "mation on or before Thursday next, and the procurators for "the pannel to give in his information on or before the ninth "day of July next.—Continue the diet against the pannel "till Monday, the 14th day of the said month of July, and "ordain all concerned to attend, each under the pains of law; "and the pannel, in the mean time, to be carried back to the "castle of Edinburgh."

June 26, 1817.

INFORMATION

FOR

ALEXANDER MACONOCHIE, *Esq. of Meadowbank, his Majesty's Advocate, for his Majesty's interest,*

AGAINST

ANDREW M'KINLEY, *present Prisoner in the Castle of Edinburgh*—Pannel.

AFTER hearing counsel a second time on the relevancy of the charges against the pannel, the first argument in the case of William Edgar having been equally applicable to the present, your Lordships still expressed a wish to have an opportunity of considering a written pleading before delivering your opinions. It was then suggested, that it would be better to serve the pannel with a new indictment, before writing the informations, in consequence of some verbal objections to the indictment, then depending, which had occurred to the Court. The course pointed out by your Lordships has accordingly been followed. The diet of the former indictment having been deserted, another was immediately served; and an interlocutor, ordering informations, was then pronounced; in obedience to which, this paper is presented. June 2, 1817. June 23, 1817.

After the consideration that has been already given to the case, the prosecutor cannot flatter himself with the hope of stating any new views of the subject that are likely to appear of much importance. Neither does he think he would be justified, by any inducement of novelty, in abandoning those grounds on which he long ago formed his opinion, that the charge against the pannel ought to pass to an assize; an opinion from which, as yet, he has seen no cause to depart. He conceives that he will best discharge his duty, by pointing out those leading views of the case on which he expects the decision will ultimately rest; and will not fatigue your Lordships or himself, by entering upon the endless *minutiæ* of verbal criticism, or expatiating on the boundless field of general discussion, which the combined efforts of so many learned men have employed in preventing, or at least delaying for a time, the trial of the offence charged against the pannel.

The statute libelled on is of recent origin, and was intended to check a great and alarming evil, which, of late years, has led to many crimes and disorders, and even to insurrection and rebellion, in different parts of the united kingdom. Conspiracies against the lives and property of others, and against the whole existing order of society, were continually breaking out, which had all of them certain marked features of resemblance, and all ultimately tended to the same end. Those conspiracies were dangerous, in proportion as they were systematic; and it was naturally thought that the foundation of the evil would be removed, if the bond of union could be destroyed by which they were formed and held together. Accordingly, the legislature declared it a capital crime to administer oaths of a particular description, this being invariably the engine of mischief by which the vicious and ignorant were united in the prosecution of their own objects, or in the blind advancement of the more dangerous schemes of others. For many years, the country has not been altogether free from such combinations; and, although dormant for a time, they have always been revived on the recurrence of any general discontent or distress. In the circumstances of the present time, they have found unusual encouragement; and even the sober and calculating spirit of the people of this part of the kingdom has not saved them from the general delusion. An association of desperate men was formed; who entertained sanguine expectations that the time was come for a new order of things, when they might participate in the power and privileges of the higher order of the state, and share the possessions of their wealthy and more industrious neighbours. The particulars of the rise and progress of this conspiracy, it would not only be foreign from the present purpose, but improper and inexpedient to detail; and, in truth, the description would have little to recommend it for interest or novelty. Conspirators of all ages and countries have a striking resemblance to each other: "Bonis invident, malos extollunt; ve-"tera odere, nova exoptant; odio suarum rerum mutari om-"nia student; turba atque seditionibus sine cura aluntur."

The proceedings of those persons were perfectly well known to his Majesty's Government; and, in order to preserve the tranquillity of the country, it at length became necessary to interrupt their labours, before their schemes burst forth into mature and active operations. The contamination, however, had spread to a considerable extent, and had struck deep root in the hearts and affections of the diseased part of the community; and, though checked for a time, by the disclosure and the fear of its consequences, there was no doubt that, upon the first opportunity, the same, or a similar plan of operations would be resumed, with increased vigour and activity.

Under these circumstances, it appeared to his Majesty's Advocate, that the proper course of his public duty was to enforce the provisions of the statute, which was passed for the express purpose of repressing such disorders. The pannel and another individual were accordingly indicted to stand trial for the statutory offence of "administering an oath, purporting or intending to bind the persons taking the same to commit treason."

The first question that naturally arises upon this charge is, Whether the oath alleged to have been administered by the pannel did purport or intend to bind the persons to whom he administered the same to commit treason. The prosecutor is not bound by the statute to set forth the terms of the oath, but only the purport of it. And it is not necessary that the oath should bear, in express terms, the guilty purpose, or should have any meaning at all, provided only it be intended and understood by the persons administering and taking it to have that end in view. It is plain, that a few letters of the alphabet, or any words of an innocent or opposite meaning, the oath of allegiance itself, might have been so administered and taken, as to constitute the statutory crime. The prosecutor is not, however, reduced to such a narrow case as this, for he produces the words of the oath itself; and undertakes to satisfy your Lordships, and every reasonable person who reads it, that the oath does expressly mean to bind the persons taking the same to commit treason. It therefore seems unnecessary to say any thing on the construction put by the pannel on the phrase "intending to bind," by which he ascribed *intention* to the oath, and not to the person; as if there were any sense in personifying an oath, and giving it the powers of the understanding and the will. Construction of the oath.

Much eloquence and ingenuity have been displayed in perverting the plain sense and meaning of the words of the oath, and endeavouring to construe out of them a sense and meaning which they are not calculated to convey, and which never entered into the imaginations of those who used them. The literal construction of the oath was not for a moment insisted on, but a general declamation was delivered upon the indulgence that ought to be shewn to persons accused of crimes, in a favourable interpretation of every question of law, and of every matter of fact, which is brought into discussion in a criminal trial. The prosecutor did not object to any rule of interpretation, within the utmost bounds of reason, that might be followed in the construction of this oath; but he thought it his duty to protest against the whole doctrine, as applicable to a question of relevancy, when the very first act of the mind of the Judge, and of every person engaged in the discussion,

is to assume the truth of the whole facts as charged. In this stage of the process, every thing is presumed to be done wickedly and maliciously, as libelled. And the question is, If all these things are as stated by the prosecutor, ought they to be followed by punishment? So clear is this rule, that things in themselves of the most innocent description, if libelled to be done wickedly and maliciously, or for the accomplishment of some illegal purpose, are daily found relevant to infer the pains of law. It was therefore maintained, that, in construing this oath, the purpose for which it was intended, and the whole circumstances under which it was administered, were to be taken into view; not that the prosecutor conceived it necessary for the case, to search for matter of relevancy beyond the words of the oath itself, but because he thought himself entitled and called upon to maintain the plain rule of law, as applicable to every question of the kind.

The words of the oath are already too familiar to the Court, and are in your Lordships' hands in the indictment; so that it is unnecessary to quote them in this place. Independent altogether of the considerations above mentioned, it is submitted, that it is impossible to construe out of the oath, standing by itself, the reservation of illegality contended for by the pannel. It is an unambiguous obligation to use all moral and physical strength, or force, that may be necessary for the end in view; and all attempts to prove the contrary must appear hopeless to every unbiassed mind. Forced constructions, fanciful illustrations, and vague analogies, will not avail against the plain meaning of the words, as they would be understood in the ordinary affairs of life. It was justly observed, that grammatical niceties were not to be employed in interpreting the meaning of persons in the lower orders of society; but it was afterwards said, that "*to support endeavours*" to obtain any thing is a solecism; because, to support endeavours is nothing else than to endeavour. Now, this is to apply one of the strictest rules of grammatical construction to the words of "these ignorant people," as in the very next sentence they were called; and to apply it to the effect of drawing the conclusion, that, because they did not express themselves according to the correct rules of chaste composition, their words cannot bear the meaning which they are expressly intended to convey. It was argued, that the words "*the same*" may be the relative to several antecedents; and that the pannel is entitled to have his choice, and to select that antecedent which is best calculated to convert the whole oath into nonsense. The prosecutor would feel ashamed, in any case, to enter into a serious discussion of such "unseemly niceties," so little congenial to the liberal spirit of our criminal law. In the present,

nothing can be more trifling or more useless, where it is so plain that there is but one antecedent, viz. the "endeavours "to obtain," to which, by every rule of common sense and sound construction, this relative can apply.

The next piece of violence that was done to the plain meaning of the oath, was the attempt to make out that the words "physical strength" are to be understood individually, and not collectively; and a distinction was attempted to be made between "force" and "strength." This argument is now in a great measure abolished by the introduction of both the words into the new indictment; as, according to the best information that has been obtained, they were not only used synonimously, but promiscuously. But the truth is, that the observation never had in itself, either force or strength; for "physical strength" is unhappily one of the most familiar ideas and most common expressions among the lower orders of politicians, in speaking of the force and power of numbers, when brought into open resistance to the ruling powers; and such common use of the expression is the fairest rule by which it can be interpreted in the place where it stands. This "physical force" is nothing else than the power to be employed in subduing the obstacle or contrary force by which universal suffrage is to be prevented; that is to say, the open violence by which this public purpose is to be accomplished, and the government overturned. It is vain to say that physical strength may be exerted lawfully, and to give strange examples of its legal exercise. The question is not what *may* be the meaning of any insulated words in the oath, but what *is* their meaning where they stand. Now, it is plain, upon the face of the oath, that the whole powers of body and mind of the conspirators were intended to be called forth, not only without limitation, but with a distinctly announced generality, that was to admit of no exceptions whatever. It was indeed attempted, on the part of the pannel, to construe out of the oath a reservation of illegality, than which nothing could be more contrary to the plain sense and meaning of the words.

The prosecutor apprehends that the whole of this argument upon the meaning of the oath received a decisive answer in the proposal to insert into it such unambiguous words as would expressly convey the meaning which it is attempted to draw from the words as they stand. The result of this experiment plainly is, to make the oath contradict itself, and appear palpably absurd; whereas, if the argument on the other side of the bar had been well founded, it should have reconciled any apparent contradiction, and made the whole consistent, distinct, and intelligible.

It would be an easy matter to illustrate the fair meaning of the oath at length, and to expose the gross fallacy and futility of every attempt to put any other construction upon it than what it expressly bears; but the prosecutor cannot doubt but such a task would appear as useless to your Lordships as it does to himself. His wish is to have that meaning put upon the words which every man of common sense would put upon them in the daily intercourse of life; and he has no doubt that it is by this test alone that your Lordships will try them. Indeed, he has been clearly of opinion from the beginning, that all argument upon the meaning of the oath, upon either side of the bar, is totally useless, and will produce no effect upon the mind of any unprejudiced man of common sense, who can read the words before him.

If this be the sound view of the case as to the construction of the oath, standing by itself, what must your Lordships think of it, when considered with reference to all the circumstances of guilt under which it is charged to have been administered in this indictment? It seems unnecessary to do more, than shortly to advert to these circumstances. They were all mentioned in the debate; and no answer was attempted to be made to their relevancy in the interpretation of the oath. The most remarkable perhaps of the whole is the administration of the oath at *secret meetings*, which is no more consistent with innocent intention, than the clause of secrecy at the conclusion of the oath, which was expressly admitted to be of itself a punishable offence. Secrecy is thus admitted to be an index of a guilty purpose; and it is of little moment whether it is admitted or not, as its existence under such circumstances is irreconcileable with innocence. It will always be remembered also, that the secrecy in this case was of no ordinary description, as it was a standing rule of the society to inflict the punishment of death upon those who revealed their secrets;—an amiable feature of the whole transaction, and which affords a pleasant commentary on the panegyric that was pronounced, at the first debate, on the "brotherhood of "affection, in which it was said to be so becoming that all the "subjects of this country should dwell together in unity!" Indeed, it may be observed, by the way, that it is impossible to find a better commentary upon the whole oath than this conclusion affords, or a better answer to the pure motives that were attempted, with so much ingenuity, to be extracted from the beginning of it:—

——*Ut turpiter atrum*
Desinat in piscem mulier formosa superne.

The extensive nature of this "brotherhood" was totally forgotten in the argument as to the individual application of the term "physical strength;" or rather, this argument, like all the rest upon the meaning of the oath, was founded on a separate consideration of each member and clause, independent of all the others. Still less was it thought necessary to take the slightest notice of the important fact stated in the libel, that the oath was actually administered to several hundred persons, whose joint endeavours were of course to be used for the promotion of the common end. It will also be remembered, in the construction of the oath, that it is libelled to have been administered to several persons, who, conscious of their guilt in the premises, have absconded and fled from justice.

The truth of all these facts must be taken for granted in the question of relevancy; and must, therefore, be taken into view in this stage of the process, in judging of the meaning of the oath. It will also be kept in view, that the oath is alleged to have been "wickedly and maliciously administered," and did "purport or intend to bind the persons taking the same "to commit treason, by obtaining annual parliaments and "universal suffrage by physical strength or force;" and it is submitted, that if the words of the oath are at all susceptible of the meaning put upon them by the prosecutor, and *may* bear that meaning, your Lordships are bound to give him credit for the truth of that construction which he puts upon them. It is quite a mistake to say, that he must shew, in this question of relevancy, that the words *must of necessity* bear the criminal meaning. If, indeed, the criminal meaning be plainly a forced construction, and one which they cannot reasonably bear, your Lordships might hesitate as to sending them to a jury, unless it were alleged that they have a hidden or different meaning from what they express. But if the meaning be neither forced nor unnatural, or if it be at all a reasonable, or even possible construction, the prosecutor is entitled to the verdict of a jury on the charge, and to demand the assumption of the truth of every allegation he makes in the preliminary stages of the process.

That the oath binds to commit treason.

But it is said, admitting the argument to have failed, that the oath is entirely innocent, it by no means follows, however dangerous or mischievous it may be supposed to be, that it binds the persons taking the same to commit treason. It is said, that it does not necessarily purport any such engagement; and the same line of argument is had recourse to here that was previously adopted, in order to persuade your Lordships that the oath is totally innocent. It is unnecessary to recur to what has been said above. If the pannel has failed, as

the prosecutor cannot doubt he has, to persuade your Lordships to construe out of this oath a reservation of illegality; and if the prosecutor be right in believing, that every man of common sense, who has these words placed before him on any ordinary occasion, will at once say that they are nothing else than an obligation to accomplish the ends in view by every means in the power of the parties, without reservation or qualification whatsoever, and especially by the whole moral or physical force in their power, or at least as much of it as might be necessary,—then the simple question remains,—Supposing these means to have been brought into action, and particularly supposing their physical force to have been brought into action for accomplishing the particular purposes in view, would this have amounted to the crime of treason? Now, upon this point, it is submitted to be clear, that the accomplishing, or attempting to accomplish, any public purpose by force, especially by the force of numbers, such as the alteration of any law, or any branch of the constitution, more particularly when the alteration is of such a nature as infers the destruction of the whole frame and texture of the government, is, by all the authorities, high treason. But upon this it seems unnecessary to enter; and, indeed, the prosecutor is unwilling, and feels it altogether unnecessary, to detain your Lordships with any remarks of his upon a subject upon which there are so many great authorities, all agreeing with each other.

In quoting these authorities at length, he is only following the example set before him by the English judges on similar occasions. "I am peculiarly happy," says Lord Loughborough, in the address to the grand jury in the case of Lord George Gordon, "that I am enabled to state the law on the "subject, not from any reasonings or deductions of my own, "which are liable to error, and in which a change or inaccura-"cy of expression might be productive of much mischief; "but from the first authority, from which my mouth only will "be employed in pronouncing the law. I shall state it to you "in the words of that great, able, and learned judge, Mr. "Justice Foster, that true friend to the liberties of his coun-"try."

The following are the passages at length, and in the order in which they stand in the original, which Lord Loughborough quotes; and, it will be observed, that Mr. Justice Foster begins the chapter with a dissent from some of the expressions of Lord Hale, which were so much dwelt upon at one period of the debate, and the present application of which has called forth so many panegyrics upon this author in the course of these discussions. Your Lordships were even told, that,

" except Coke, Lord Hale is the only author allowed to be " cited as an authority in an English Court,"—a position too extravagant to require a commentary. But it is a singular circumstauce, that the English Judges, on such occasions, do not appear to refer at all to this " great father of the law of treasons," as he was termed in the debate; and that the authority to which they do refer commences with a dissent from his opinions. Not that the prosecutor is ignorant of the great name and venerable authority of that excellent person, but he wishes to point out to your Lordships, that his opponents have been somewhat too extravagant in their admiration of his authority, as applicable to the present case; and that it is usual to look to more recent expositions of the law, composed in better times.

" Lord Chief-Justice Hale, speaking of such unlawful " assemblies as may amount to a levying of war within the " 25th Elizabeth, c. 3, taketh a difference between those " insurrections which have carried the appearance of an " army, formed under leaders, and provided with military " weapons, and with drums, colours, &c. and those other " disorderly tumultuous assemblies, which have been drawn " together, and conducted to purposes manifestly unlawful, " but without any of the ordinary shew and apparatus of war " before mentioned. Foster's Crown Law, p. 208.

" I do not think any great stress can be laid on that dis- " tinction. It is true that, in case of levying of war, the in- " dictments generally charge, that the defendants were armed " and arrayed in a warlike manner; and, where the case " would admit of it, the other circumstances of swords, guns, " drums, colours, &c. have been added. But, I think, the " merits of the case have never turned singly on any of these " circumstances.

" In the cases of *Damaree* and *Purchase*, which are the last " printed cases that have come in judgment on the point of " constructive levying war, there was nothing given in evi- " dence of the usual pageantry of war;—no military weapons " —no banners or drums—nor any regular consultation pre- " vious to the rising. And yet the want of those circum- " stances weighed nothing with the Court, though the prison- " er's counsel insisted much on that matter. The number of " the insurgents supplied the want of military weapons; and " they were provided with axes, crows, and other tools of the " like nature, proper for the mischief they intended to effect:

" *Furor arma ministrat.*"

" *Sect. I.*—The true criterion, therefore, in all these cases, " is *quo animo*, did the parties assemble? For, if the assem-

" bly be upon account of some private quarrel, or, to take re-
" venge of particular persons, the statute of treasons hath al-
" ready determined that point in favour of the subject."

P. 210. " *Sect. III.*—But in every insurrection which, in judgment
" of law, is intended against the person of the King, be
" it to dethrone or imprison him—or to oblige him to alter his
" measures of government—or to remove evil counsellors from
" about him—these risings all amount to levying war within
" the statute; whether attended with the pomp and circum-
" stances of open war or no. And every conspiracy to levy
" war for these purposes, though not treason within the clause
" of levying war, is yet an overt act within the other clause of
" compassing the King's death. For these purposes cannot be
" effected by numbers and open force without manifest danger
" to his person.

" *Sect. IV.*—Insurrections, in order to throw down all en-
" closures, to alter the established law, or change religion,
" to enhance the price of all labour, or to open all prisons;
" all risings, in order to effect these innovations, of a public
" and general concern, by an armed force, are, in construc-
" tion of law, high treason, within the clause of levying war.
" For, though they are not levelled at the person of the King,
" they are against his royal majesty; and, besides, they have
" a direct tendency to dissolve all the bonds of society, and
" to destroy all property, and all government too, by numbers,
" and an armed force. Insurrections likewise for redressing
" national grievances, or for the expulsion of foreigners in ge-
" neral, or indeed any single nation living here under the pro-
" tection of the King, or for the reformation of real or ima-
" ginary evils *of a public nature, and in which the insurgents*
" *have no special interest*; risings to effect these ends by force
" and numbers, are, by construction of law, within the clause
" of levying war; for they are levelled at the King's crown
" and royal dignity."

P. 215. " Upon the trial of Damaree, the cases referred to be-
" fore, in sections 4th and 5th, were cited at the bar; and
" all the Judges present were of opinion, that the pri-
" soner was guilty of the high treason charged upon him
" in the indictment. For here was a rising with an
" avowed intention to demolish all meeting-houses in gene-
" ral; and this intent they carried into execution as far as
" they were able. If the meeting-houses of the Protestant
" dissenters had been erected and supported in defiance of all
" law, a rising to destroy such houses in general, would have
" fallen under the rules laid down in Keiling, with regard to
" the demolishing all bawdy-houses. But, since the meeting-

" houses of Protestant dissenters are, by the Toleration Act, " taken under the protection of the law, the insurrection, in " the present case, was to be considered as a public declara- " tion by the rabble against that act, and an attempt to ren- " der it ineffectual by *numbers and open force.*

" Accordingly, Damaree was found guilty, and had judg- " ment of death, as in cases of high treason."

In the same case of Lord George Gordon, Lord Mansfield expresses himself thus, in addressing the jury. " There are " two kinds of levying war, one against the person of the " King, to imprison, to dethrone, or to kill him, or to make " him change measures, or remove counsellors; the other, " which is said to be levied against the majesty of the King, " or, in other words, against him in his royal capacity, as " when a multitude rise and assemble to attain by force and " violence any object of a general public nature, that is, levy- " ing war against the majesty of the King; and most reason- " ably so held, because it tends to dissolve all the bonds of " society, to destroy property, and to overturn government, " and, by force of arms, to restrain the King from reigning " according to law.

" Insurrections, by force and violence, to raise the price of " wages; to open all prisons; to destroy meeting-houses; nay, " to destroy all brothels; to resist the execution of militia " laws; to throw down all enclosures; to alter the established " law; to change religion; to redress grievances real or pre- " tended; have all been held levying war. Many other in- " stances might be put. Lord Chief Justice Holt, in Sir " John Friend's case, says,—' If persons do assemble them- " selves, and act with force, in opposition to some law which " they think inconvenient, and hope thereby to get it repeal- " ed, this is levying war and treason.' In the present case, " it don't rest upon an implication, that they hoped by oppo- " sition to a law to get it repealed; but the prosecution pro- " ceeds on the direct ground, that the object was by force and " violence to compel the legislature to repeal a law; and, " therefore, without any doubt, I tell you the joint opinion of " us all, that if this multitude assembled with intent, by acts " of force and violence, to compel the legislature to repeal a " law, it is high treason.

" Though the form of an indictment for this species of trea- " son mentions drums, trumpets, arms, swords, fifes, and " guns, yet none of these circumstances are essential. The " question always is, whether the intent is, by force and vio- " lence, to attain an object of a general and public nature by " any instruments, or by dint of their numbers."

Hawkin's Pleas of the Crown, p. 37.

In like manner, Serjeant Hawkins thus expresses himself: "Those also who make an insurrection, in order to redress a "public grievance, whether it be a real or pretended one, and "of their own authority attempt with force to redress it, are "said to levy war against the King, although they have no "direct design against his person, inasmuch as they insolent- "ly invade his prerogative, by attempting to do that by pri- "vate authority, which he by public justice ought to do, "which manifestly tends to a downright rebellion; as where "great numbers by force attempt to remove certain persons "from the King; or to lay violent hands on a privy council- "lor; or to revenge themselves against a magistrate for exe- "cuting his office; or to bring down the price of victuals; or "to reform the law or religion; or to pull down all bawdy- "houses, or to remove all enclosures in general, &c. But "where a number of men rise to remove a grievance to their "private interest, as to pull down a particular inclosure, in- "trenching upon their common, &c. they are only rioters."

Hume, vol ii. p. 427.

Mr. Hume most ably and accurately sums up the doctrine of all the great authorities in the following terms:—"In the "construction of law, the levying of war against the King is "not understood in those insurrections only which have im- "mediate relation to the person of his Majesty, as if the ob- "ject be to dethrone or imprison him, or to drive him out of "the realm, or to cause him alter his measures, or to remove "evil counsellors from his presence. It equally embraces all "those risings, which, though not aimed directly at the per- "son of the King, are however against his royal Majesty, "that is, against his crown or royal dignity, against his pre- "rogative, authority, or office. Under this description, ac- "cording to all authorities, falls an insurrection for any of "these objects,—to reform the established law, religion, or "political constitution of the land; or to obtain redress for "national grievances, whether real or imaginary. For though "they be real, the law and government of the realm, as long "as they subsist, cannot know any thing of this course of cor- "recting them, nor make account of it as any other than re- "bellion against the King, who, as the head of the state, is "bound to prevent all such forcible interference of private "persons with his own functions, or those of the legislative "power."

It is impossible to add any thing to these authorities, which combine the names of some of the greatest men that ever adorned the English bench, speaking on cases actually before them, with those of the best commentators on the law, who were more deliberately composing for posterity. The applica-

tion of these authorities to the present case is obvious; and there can be no doubt that, if the public purpose in view had been carried into effect, or attempted to be carried into effect, by force, it would have been high treason.

Objection to want of description of treason.

The next objection that was stated was, that the prosecutor has not specified the manner in which the treason was to have been committed, which it is libelled that the pannel administered an oath, purporting or intending to bind the persons taking the same to commit. Upon this, and indeed other parts of the case, wherever it suited the argument, it was broadly assumed, on the other side of the bar, that this is a charge of treason. Now, the exposure of this obvious fallacy is the plain answer to this objection. It is a known rule of law, "that such an account of a criminal deed must be given, as may distinguish the particular charge from all other instances of the same sort of crime;" and if this had been a charge of treason, unquestionably the prosecutor would have been bound to give the specification called for by the pannel. But the fact is, that there is no treason charged, nor any other crime libelled, in the major proposition, except that whereof the whole facts are detailed in the subsumption. The crime is, the administering an oath, purporting to bind the person taking the same in a particular manner; and it is believed the administering of this oath is sufficiently distinguished from the administering of every other oath, and from every other act of administering the same oath. The object, which that oath contained, or was intended to contain, an obligation to accomplish, was never carried into effect; and if it had, it would have been a crime of a different description. Now, what can the prosecutor set forth of the purport or the intendment, which is the essence of the crime, except the terms of the oath itself, and such other circumstances as accompanied the administration of it, as may throw light upon the meaning of the administrators and takers? All this he has done, and more he cannot do. He cannot state more of the facts than he knows; nor can he state more than was actually perpetrated; and the oath is the whole fact, and only source of information. Still less can he be called upon to draw an inference in law from facts that have never existed. The minor proposition is a detail of facts, and has nothing to do with law; and if he had drawn the inference required by the pannel, he would not have added one *iota* to the relevancy. He has told your Lordships all that was done; the whole facts of the case; and it is the principal part of these facts, that there was an obligation to commit a crime. That this crime, if committed, would have been of a particular descrip-

Hume, vol. iii. p. 310.

tion, and effected in a particular way, is nothing to the purpose, as it is not the *intended crime*, but the obligation to commit it, that is the point of dittay.

The prosecutor has in fact done much more than he is bound to do in this respect; for he has specified the precise objects and acts intended to be done, which in many cases may not be within his power. Suppose the parties administer and take an obligation, binding to commit treason generally, or, in the words of the act itself, "any treason," or all the ten treasons enumerated at the debate, or such treason as may be necessary for the accomplishment of a particular end, or which they may be called upon to commit, by any individual or number of individuals, whose authority they bind themselves to obey; is it to be said that there is no relevancy, because the prosecutor cannot specify the particular description of the treason which it is intended to commit? Or, suppose an obligation to murder all those who stand in the way of some particular end: the individuals who may stand in the way, and the manner of their death, may be unknown both to the prosecutor and the conspirators; is it to be said that the statute libelled no operation in such a case?

The prosecutor points out what was actually done, and founds upon the law by which it is punishable; and here he apprehends his duty is discharged. He has nothing to do with the manner of an intended act, and far less with an inference in law from a fact that never had existence. He is bound to tell the pannel the facts he intends to prove against him, and the law by which they are punishable, in order that he may be prepared for his defence; but he does not know how it can help the pannel to shape his defence, to tell him what would have been the legal consequence of an act of which he is not accused, and which he only intended to commit. He might as well be required, in a case of an indictment for an attempt to poison, to specify the mode of death, and the legal consequences of murder. It is maintained, that this indictment would have been perfectly relevant, if it had merely libelled the wicked and malicious administration of the oath charged, without a syllable as to what its purport or intendment is; for, if the oath means what the prosecutor alleges, the prosecutor's gloss upon it is mere surplusage. If it did not mean any thing that comes under the act, then to be sure it would be necessary to libel the hidden meaning and purpose with which it is administered and taken, otherwise there would be no relevancy in the charge. But, if it openly express the unlawful meaning, as in the present case, it is itself the minor proposition, the connecting link between the major

proposition and the conclusion; and the prosecutor knows no addition that can make the syllogism more perfect. *Maj.* The administering an oath of a particular description is a crime: *Min.* You did administer the following oath: *Ergo*, You ought to be punished.

If the libel rests upon the meaning of the oath itself, it is plain that the only question here is, whether the oath libelled falls under the particular description mentioned in the major proposition? and, so far as the case turns upon the meaning of the words of the oath, the Court will certainly judge for themselves, without the least regard to any argument or inference of the prosecutor. In so far as the case turns upon a meaning not expressly conveyed by the words, the allegations of the prosecutor, as to the intendment, must enter into the relevancy. But here he maintains his charge upon the meaning of the words themselves; and, setting aside all the rest of the qualities affirmed of the oath as superfluous, he calls upon your Lordships to say whether it falls under the statute or not; and denies that he is bound to set forth in the minor proposition any thing but what was actually done, and the time, place, and manner of the deed. He has accordingly described the time, and place, and a number of the circumstances under which the oath was administered; and, above all, he has stated the names of the individuals to whom it was administered, perhaps the most useful circumstance of the whole, in order to prepare the pannel for his defence. But, as to detailing the time, place, and circumstances, of what existed in intention, it is obvious that such a specification is beyond his power. The oath may be administered before any part of the detail of the execution of the treason is arranged, —before any understanding among the conspirators as to their particular plan of operations—and, by its nature, the oath is likely, in general, to be the preliminary to every thing else. Yet here he is asked, not only to detail facts that have not happened, but to draw from them an inference in law. Now, he must say, that he cannot conceive any thing more foreign from the nature of a minor proposition, than the detail of a deed in contemplation, unless perhaps it be an inference in law from a crime which never had an existence. In short, he has set forth the administering an oath, purporting to bind, as forbidden by the statute; and he submits, that it is travelling out of the case altogether, to ask any thing of him beyond the oath itself, and the time, place, and circumstances of the administration. He can know nothing of the guilty purpose more than the parties told him in the oath.

The prosecutor has attentively reconsidered this part of the argument for the pannel; and, from the beginning to the end of it, he has not been able to discover a single piece of reasoning that directly meets the point. The whole of it, without exception, proceeds upon the erroneous assumption, that it is a charge of treason of which your Lordships are now called upon to judge; and if this plain distinction is kept in view, he will venture to say, that the argument has not even the vestige of plausibility.

Whether an offence against this act can be tried, being treason.

Another objection to the relevancy of this indictment was derived from a principle of the English law, which it was attempted to apply to this case, that all felony merges in treason; from which it was said to follow, that if the facts set forth in the indictment amount to treason, they cannot be tried as an offence against the act libelled on. The learned gentleman who maintained that plea, was obliged to assume the fallacy of all the ingenious arguments that had gone before, to shew that there is no treason in the case, and to abandon the whole of those rules of construction of the oath and the indictment, for which so great a struggle was made by the other counsel for the pannel. He assumed, that treason was not only in the view of the parties, and intended to be committed, but that, by taking and administering the oath, they were guilty of treason by the act of the 36th of the King. It is necessary, therefore, before you can pay any attention to this alternative plea, that your Lordships should come to be of the prosecutor's opinion as to the relevancy of the indictment on the meaning of the oath; for this part of the argument for the pannel is totally inconsistent with, and destructive of the other.

One or two remarks were made, with much diffidence, at the time, on the long and learned argument by which this view of the subject was supported; but the prosecutor has since had the satisfaction to find, from a consideration of the English writers, and from the best authorities to which it was in his power to apply for information, that those remarks were perfectly well founded. Indeed, he is now totally at a loss to account for the respect with which he listened to this argument at the time when it was first delivered, upon any other ground than the impression on his mind, that what was prepared with so much labour, and maintained with so much confidence and parade of learning, must have had something to recommend it, which he was not able to discover. He has now, however, ascertained, that there was no discovery to make; and has accordingly again to state to your Lordships, that the principle of the common law of England founded on,

has no application to any trial in this Court according to the law of Scotland; and that, even in England, it has no application to a trial for an offence against the act of the 52d of the King

1*st*, It is understood to be a principle in English law, that if a man be tried for an offence as a felony, which in fact amounts to treason, he must be acquitted, and he may be tried over again for treason. But there is no authority for saying that a man cannot be tried for felony when his offence amounts to treason; and it is obvious that this could never be law, because the jury alone can judge whether he has committed treason or not; and unless they are satisfied, upon the evidence, that he has committed treason, he cannot be acquitted, on this ground, of the felony. It is the law of England, that a man acquitted on such grounds may be tried again for the same fact under another denomination of crime; and the legislature, in favour of offenders, have thought fit to make a trial under this act, an exception from the general rule; and have declared, "That any person who shall be tried, and ac- Sect. 8.
"quitted or convicted of any offence against this act, shall not
"be liable to be indicted, prosecuted, or tried again, for the
"same offence or fact, as high treason, or misprision of high
"treason." It is therefore submitted, that this objection, derived from the law of England, is one that can only be judged of by the jury, as the Court cannot try the fact, and is an objection to a conviction, and not to a trial, as the terms of the act shew—which take for granted the possibility of a trial for an offence under the act, which offence may turn out to be treason. If no person can be tried for an offence against the act, which offence may at the same time be treason, this clause implies an absurdity.

2*dly*, But the meaning of the legislature does not rest upon these words alone. For, considering that the offences against this act might often amount to treason, it occurred that it might be argued that this act, being the last declaration of the will of the legislature as to such offences, did, by appointing this mode of prosecution, abrogate all former laws against them; and it was further enacted, "That nothing in this act Sect. 8.
"contained shall be construed to extend to prohibit any per-
"son guilty of any offence against this act, and who shall not
"be tried for the same as an offence against this act, from
"being tried for the same as high treason, or misprision of
"high treason, in the same way as if this act had not been
"made." Thus plainly shewing that it was fully under the view of those who passed this law, to make it occasionally ap-

plicable to cases of treason which it should not be thought expedient to punish as such.

3dly, The act itself not only makes express provision for the trial of "any offence committed against this act," which of course includes cases that may amount to treason, before this Court, but the clause is expressed in such a manner, as to demonstrate that the offences are to be tried in the ordinary way.

Section 7. "Provided also, and be it further enacted, That any offence "committed against this act on the high seas, or out of this "realm, or within that part of Great Britain called England, "shall and may be prosecuted, tried, and determined, before "any Court of Oyer and Terminer, or Gaol Delivery, for any "county in that part of Great Britain called England, in "such manner and form as if such offence had been therein "committed; and, if committed in that part of Great Britain "called Scotland, shall and may be prosecuted, tried, and de-"termined, either before the Justiciary Court at Edinburgh, "or in any of the Circuit Courts in that part of the united "kingdom."

4thly, The whole enactment would be nugatory, as far as the binding to commit treason goes, if this argument be well founded; for every oath binding to commit treason may be maintained to be treason as well as the present. It may be said, that no oath can be administered to kill or to depose the King, or to overturn the government, that would not be an overt act of treason, in compassing or imagining the King's death. The treason would be the imagination or intention, and the oath the overt act manifesting it. So, the administering an oath to levy war for a public purpose, might be said to be a conspiracy between the persons administering and taking the same to levy war, (though not treason as levying war;) and the oath or conspiracy might be said to be an overt act of compassing the King's death, or to be treason under the 36th of the King. In England, the oath of one witness is sufficient proof of the statutory offence, but two witnesses are necessary for proof of treason; and suppose the evidence of only one witness to be had, if the offender could not be convicted of the statutory offence, he could not be convicted at all. Upon the statute, therefore, it is submitted to be quite clearly the meaning of this law, to make the administering or taking an oath, purporting to bind to commit treason, triable according to the ordinary course of justice, whether it be treason or not.

What has been already said, is such an answer as might be made in an English court to this objection; but though the preceding view of the subject be of itself quite conclusive and

satisfactory, the prosecutor can by no means admit that it is necessary to have recourse to any part of it in the present case. For he maintains, that the statement formerly made is perfectly correct; that the principle of the law of England, as to the merging of felony in treason, has no application whatever to trials before the Criminal Courts of Scotland. It will not do to say generally, that the whole doctrines of the English law, as to treason, have been introduced into Scotland. Let us attend for a moment to the expressions of the act of Queen Anne, and we shall distinctly see what the legislature did. In the first place, they enact, that all crimes and offences which are treason in England, shall be treason in Scotland; and that no other crimes or offences shall be treason in Scotland. Does this compel the prosecution of any crime as treason, which may be tried under another and lower denomination? Certainly not. It is an established maxim of our criminal law, that a man may be tried for a crime under any denomination of which it is susceptible; and, particularly, that a prosecutor cannot be compelled to charge it by its highest denomination. If an act be passed, declaring a particular offence to be henceforth one of a higher description than it has formerly been, the prosecutor is only empowered, not compelled, to try it under its newly acquired character. Examples of this doctrine need not be given; they occur in daily practice. If, instead of declaring their meaning expressly, the legislature make reference to any particular law of England, or of any foreign country, which is quite the same thing, and declare, that what is a crime by that foreign law, in that foreign country, shall henceforth be a crime here, and punishable in the same way, this will not abrogate the previously existing common law of the land, by which the same offence is punishable as a lower or different description of crime. The great principles of our common law, sanctioned by the experience of ages, and founded on the immutable basis of reason and truth, are not to be taken away by implication. Your Lordships have acknowledged this doctrine in a hundred instances, to which it is needless to refer; as, for example, in the remedy of suspension, which has been most properly held not to be taken away, even by a clause declaring the judgment of an inferior court final to all intents and purposes. But here there is no such implication of any interference with the rules of our common law. It is said, that such and such offences shall be treason; but it is neither said nor implied that they shall always be tried as such whenever they occur, notwithstanding any rule of law to the contrary. The law of treason, introduced by the act of Queen Anne, is entirely statutory, and has

7 Anne, c. 21, sect. 1.

Hume, vol. iii. p. 276.

nothing to do with the common law of England, of which every subject, and every lawyer, in this part of the kingdom, is presumed and entitled to be in total ignorance.

Sect 3. In the next place, the act of Queen Anne appoints trials for high treason in Scotland to be conducted "in the same "manner" as in England. And certainly it can as little be maintained to be a consequence of this part of the statute as of the other, that the general principle of the common law of Scotland shall be abolished, by which a man may be competently tried for an offence by a lower than the highest denomination of which it is susceptible, and that a general principle of the common law of England, not peculiar to the law of treason, shall be substituted in its room. And who does not see that in this, as in other instances, our practice is the most favourable to the accused, as our law fixes only a *maximum* in the scale of legal responsibility, and leaves the rest to the prosecutor? Declaring, however, that of whatever form of charge he shall make his choice, the offence or fact which shall once have been submitted to the investigation of a jury, can never again, in any shape, or under any description, be made the subject of trial, whatever may be the result. Now, this circumstance at once explains the origin of the maxim of English law above-mentioned, and its total inapplicability to our criminal code, that whereas, in the English practice, a man may be tried over again for the same fact, under a different description of the crime, it therefore becomes essential to the ends of justice that he should be acquitted of the first charge, that he may not be twice convicted and twice punished for the same offence. In our practice, on the other hand, if the accused shall have once tholed an assize for a criminal deed, by whatever *nomen juris* it may be defined in his indictment, whether acquitted or convicted, he has made his atonement to the law, and is for ever free from all criminal prosecution on that account. The plain meaning of the act of Queen Anne is, to make the same criminal deeds treason in both parts of the united kingdom, and to have them tried in the same manner; and it would have been going much farther to have altered the law of Scotland, so as to make it imperative to try for treason, what, by a general principle of that law, might be less severely punished, and to prevent the trial of a man for a less offence, whose acts might amount to a greater.

In the present case, too, it will always be kept in remembrance, that the argument is not merely that the act of Queen Anne has abolished a general principle of our common law, and introduced a general principle of the English common law, but that it has such force and validity as to destroy the express

words of the subsequently declared will of the legislature in the 52d of the King

It is impossible to dispute that, in the legal definition of the crime of treason—in the mode and form of process by which it is to be tried—in the rules of evidence by which it is to be established—in the mode and effect of conviction and punishment,—in short, in the whole process, from the commencement to the termination, the law of England is transferred to Scotland. But, at this point, the transference of the English law, and the innovation upon the Scotch law, stopt short. If this, therefore, had been a prosecution for the crime of treason, your Lordships must have looked to the rules of the law of England.

But, as has been already observed, the proposition upon which the counsel of the pannel rest, is of a totally different description. This is the first occasion, it is believed, on which it has ever been hinted at or maintained by any lawyer in either kingdom; and it is impossible to contemplate the effects of it without the deepest alarm. The proposition is, that, by the articles of union, a general principle of the English criminal law has been introduced into Scotland. It is a quality in the definition of felony It is a defence against a charge of felony, that the facts from which it is inferred constitute the higher crime of treason. Nay, more, it is likewise a quality in the definition of every inferior crime, and is not pretended to be peculiar to felony. It must be admitted to be a principle inherent in, and diffused over, the whole common law of England relating to crimes. If the principle maintained by the counsel for the pannel be correct, then murder, robbery, theft, assault, mobbing, or sedition, cannot be tried, if the facts from which these crimes are deduced can, by any construction, however forced, be proved to infer the crime of treason. The privilege of the public prosecutor in Scotland, by which he is entitled to prosecute for the lowest denomination of crime which the criminal act infers, would be destroyed by the introduction of this strange principle, and without any conceivable advantage. For, in England, private individuals being the prosecutors, they might occasionally be induced to favour the party accused, by trying them upon a charge inferring too low a punishment; but here the invaluable institution of a public prosecutor prevents such a risk.

On the whole, the answer to this plea is clear and irresistible; namely, that although the law of treason, as that crime is prosecuted, defined, and proved in England, was, by the articles of the national union, transferred to Scotland; yet every other part of our criminal code was, in all the

purity and simplicity of its systematic principles, secured inviolate.

It would be an easy task to point out other objections to this part of the argument, and to expose various errors, both in the law and general reasoning, by which it was supported; but enough has been said already to satisfy your Lordships, that of all the reasonings which the consultations of the *eight* learned gentlemen of counsel for the pannel have produced, this is that which is least deserving of your serious attention.

It shall only be observed further, before quitting this subject, that, in several of the cases of sedition which occurred some years ago, it was expressly stated, both at the bar and on the bench, that certain acts charged amounted to treason, and might have been so libelled; and yet no objection occurred on that ground to their relevancy.

The prosecutor trusts that he has now sufficiently answered all the objections to the relevancy of the indictment that are likely to appear deserving of any attention. At the same time, as this indictment differs in some verbal alterations from the last, it is more than probable that it may suggest to the ingenuity of his learned friends some verbal criticisms, of which he is not aware. Of such he shall only say in general, that it is not for the purpose of affording an opportunity of discovering objections of this description that pannels are served with copies of their indictments fifteen days before their trial, but in order to make them acquainted with the nature of the facts to be proved against them, that they may be adequately prepared for their defence. If a fair and candid statement has been given to the pannel of the crime with which he is charged, so as he may know it from all other instances "of the "same sort of crime," this is the essence of the relevancy; and the humane indulgence, in the previous service of the indictment, in which our practice differs from that of England, renders that critical and punctilious accuracy quite unnecessary here, which it is the genius of the English practice to observe, in slight and immaterial modifications of names and expressions. "I cannot find," says Mr. Hume, speaking of this peculiarity of the English practice, "that in this respect we "have ever been disposed to follow their example, but rather, "and I think with as sound a judgment, to disregard such "criticisms as unseemly niceties, which serve only to disap- "point the course of justice, and bring the law itself into con- "tempt." It cannot, however, be denied, that attempts have of late been made to encroach upon the general principles of sound reason, by which our criminal law in such matters has

been in time past administered, and to substitute in their room a minute criticism, and technical construction of certain words and phrases, totally useless in our courts for the protection of innocence, but certainly tending to facilitate the occasional escape of the guilty. Our best and ablest commentator has shewn much anxiety to guard against this evil in many passages of his valuable work; and, unquestionably, unless the law is protected from its growth by the wisdom of the Court, it will tend to degrade a liberal science to a mechanical art; and, in time, to produce effects upon our criminal code, not very dissimilar to what would follow from such a retrograde movement in philosophy, as would restore to its empire the logic of the schools.

Hume, vol. Introduction, p. 44; vol. iii. p. 316; Sup. p. 269; *et alibi passim.*

Mr. Hume, in the passage above quoted, probably had in view the beautiful and impressive language of Lord Hale on this subject;—an authority which cannot fail to meet with respect on the other side of the Bar. "In favour of life great "strictness have been, in all times, required in points of in- "dictments; and the truth is, that it is grown to be a blemish "and inconveniency in the law and the administration there- "of. More offenders escape by the over easy ear given to "exceptions in indictments, than by their own innocence; "and many times gross murders, burglaries, robberies, and "other heinous and crying offences, escape by these unseemly "nicetie, to the reproach of the law, to the shame of the go- "vernment, and to the encouragement of villany, and to the "dishonour of God; and it were very fit that, by some law, this "overgrown curiosity and nicety were reformed, which is now "become the disease of the law; and will, I fear, in time "grow mortal, without some timely remedy." The editor adds, in a note: "This advice of our author would, if com- "plied with, be of excellent use; for it would not only pre- "vent the guilty from escaping, but would likewise be a "guard to innocence; for thereby would be removed the only "pretence upon which counsel is denied the prisoner in cases "of felony; for if no exceptions were to be allowed but what "went to the merits, there would then be no reason to deny "that assistance, in cases where life is concerned, which yet "is allowed in every petit trespass." In Scotland, where criminals have, in every stage of the process, the assistance of counsel, and the advantages of being served with copies of their indictments fifteen days before trial, and of having every point of law discussed before they are sent to a jury, justice requires no favour to objections that do not enter into the merits of the case.

Hale's H. P. C. vol. ii. p. 193.

According to the prosecutor's notion of his public duty, it would be impossible for him to do any thing more inconsistent with it, than to admit that, in this or any other case, any technical words or phrases are essential to the relevancy of the minor proposition of an indictment. It is established law, that, "although the subsumption must be suitable in substance to the outset of the libel, it is not necessary, in our practice, to employ and repeat the precise same technical terms in the one as in the other member of the charge. It is sufficient that facts are related in the subsumption, which amount to the crime whereof, in the outset, the libel professes to accuse." He has no desire, however, to shelter himself under this rule from any but frivolous and captious objections. He has endeavoured to express himself in as precise terms as possible: and he is confident he has expressed himself with more precision and accuracy than the received practice of the law requires. He has even yielded to the clamour from the other side of the bar for the insertion of the word *feloniously*, because it appeared to him at least a harmless, and certainly not an inappropriate, expression, in libelling upon a British statute, where the offence or crime is designated by the term "felony," though felony has no technical meaning in the law of Scotland; and it has been repeatedly decided, on the soundest principles, that the want of this epithet is no objection whatever to the relevancy of any charge.

Hume, vol iii. p. 304.

Hume, vol. iii. p. 413. and Sup. p. 227.

At all events, whatever special objections may be taken to any expressions in the subsumption, your Lordships will always remember, that if the charge of art and part be correctly stated in terms of the act of parliament, it is impossible that any "exception or objection take awaie that part of the "libel."

1592, cap. 153.

On these grounds, the prosecutor submits, the indictment ought to be found relevant to infer the pains of law.

In respect whereof, &c.

H. Home Drummond.

July 10, 1817.

INFORMATION

FOR

ANDREW M'KINLEY, *present Prisoner in the Castle of Edinburgh,*

AGAINST

ALEXANDER MACONOCHIE, *Esq. of Meadowbank, his Majesty's Advocate, for his Majesty's interest.*

On the 22d day of February last, the informant, Andrew M'Kinley, was apprehended on a warrant by the Sheriff of Lanarkshire, on a charge of being engaged in a "treasonable "plot or conspiracy," intended to "accomplish the subver- "sion and overturn of the present constitution and govern- "ment of this kingdom," &c.; and also of having taken and administered oaths, contrary to the statute of the 52d Geo. III. c. 104. The application also stated, "That *trea-* "*sonable* correspondence, by letter and otherwise, had been "held with other districts of this country, and of England; "and that *arms, ammunition, and offensive weapons, have been* "*prepared and collected,* or are ordered, and in process of be- "ing made, prepared, and collected." On that warrant he was brought before the Sheriff for examination; and thereafter he was committed to the jail of Glasgow, till liberated in due course of law, by a warrant of the Sheriff, on charges of a similar import.

Of this date, a petition was presented to your Lord- March 17, 1817.
ships, in the name of his Majesty's Advocate, which set forth, "That your petitioner charges Andrew M'Kinley "and William Edgar, present prisoners in the tolbooth of "Glasgow, with *high treason*, and with *a treasonable con-* "*spiracy* to obtain annual parliaments, and universal suf- "frage, by physical force, and particularly, *with taking and* "*administering* oaths, binding themselves, under pain of "death, to the accomplishment of those purposes; the ad- "ministering of which oaths is a capital felony, by the sta- "tute of the 52d of the King, in that case made and pro- "vided, c. 204.; which crimes the said persons are charged "with having committed," &c. It prayed your Lordships

" to grant warrant to any of the macers of Court to transmit " the said Andrew M'Kinley, and William Edgar, under a " sure guard, till they are brought to, and incarcerate for the " said offences in the castle of Edinburgh, till liberate there- " from in due course of law." On this application, your
March 17, 1817. Lordships granted warrant accordingly, for delivering, receiving, and transmitting the informant and William Edgar, " till they are brought to, and incarcerate within, the " castle of Edinburgh, therein to be detained, till thence li- " berated in due course of law," &c.

As the informant thus stood, committed expressly for the crime of high treason, as well as for another offence of an inferior denomination, he was advised that it would be in vain for him to apply for letters of intimation, under the statute 1701, c. 6. in order to limit the possible duration of his confinement; because the statute of the 7th Anne, c. 21. having introduced the whole law of England in regard to the trial of the crime of treason, no intimation to his Majesty's Advocate could in that case be competent to compel either the commencement or the conclusion of the trial.

But, soon after the informant had been thus imprisoned, he was served with an indictment, charging him, not with the crime of treason, but with the crime of felony, under the statute of the 52d Geo. III., which provides, that any person who shall " administer, or cause to be administered, or be " aiding or assisting at the administering of any oath or en- " gagement, purporting, or engaging to bind the person " taking the same to commit any treason or murder, or any " felony punishable by law with death, shall, on conviction " thereof, be adjudged guilty of felony," &c. And, at the same time that this indictment was served on the informant, a similar indictment was executed against William Edgar.

The informant was advised by his counsel that this indictment was in many respects irrelevant, both in its form and in its substance. In the minor proposition it stated, That the informant was guilty of the said crimes, in so far as he, having " wickedly, maliciously, and *traitorously conspired and* " *agreed, with other evil disposed persons*, to break and dis- " turb the public peace, to *change, subvert, and overthrow the* " *government, and to excite, move, and raise, insurrection and* " *rebellion;* and especially to hold and attend secret meet- " ings, for the purpose of obtaining annual parliaments, and " universal suffrage, by unlawful and violent means, did then " and there, wickedly, maliciously, *and traitorously* adminis- " ter, or cause to be administered, or did aid or assist in the " administering, to a great number of persons, an oath or en-

" gagement, or an obligation in the nature of an oath, in the " following terms, or to the following purport." It then set forth an oath in certain specified terms, bearing in the body of it these particular words, " and that I will support the " same to the utmost of my power, either by moral or physi- " cal strength, as the case may require." And it subsumed, " which oath or obligation did thus purport, or intend, to " bind the persons taking the same to commit treason, *by ef-* " *fecting, by physical force, the subversion of the established go-* " *vernment, laws, and constitution of this kingdom.*"

William Edgar was first brought up for trial, on the 9th April 1817. On that occasion, his counsel stated various objections to the relevancy of the indictment. *1st*, That the facts averred in the minor proposition, taking them as they were stated, did not amount to the crime charged in the major; and, in particular, that the oath set forth did not purport or intend to bind the parties taking the same to commit any treason. *2dly*, That the charge in the minor proposition was not sufficiently specific; and, in particular, that it did not state the particular treason, to the commission of which the oath was alleged to purport or intend to bind the parties taking the same. *3dly*, That, in so far as there was any attempt at specification, the libel was irrelevant, in so far as it averred that to be a treason, which is not a treason of any known denomination. *4thly*, That the statement in the beginning of the minor proposition, which charged directly a treasonable conspiracy, was not competent or admissible, being in fact an attempt to prove the crime of treason against the pannel, under an indictment which did not charge treason in the major proposition, and in a form of trial not competent in that case. Objections, having these general characters, were argued at considerable length; and it was particularly observed, that the prosecutor, after quoting the oath, in which the words, " either by moral or physical *strength*" were used, had, in his own commentary, found it necessary to *change the term*, and to state that the oath bound the parties to commit " treason, by effecting by physical *force* the subversion," &c.

When that debate was concluded, your Lordships delivered your opinions, and very grave and serious doubts were expressed concerning the relevancy of the libel. Considering the case to be of great importance, your Lordships ordered the parties to lodge informations on the points which had been argued. On the same day, the diet against the informant, M'Kinley, had been adjourned to the 10th of April; but the diet against Edgar was adjourned till the 19th May.

Soon after this adjournment, his Majesty's Advocate, feeling undoubtedly the weight of the objections which had been urged against the libel as it stood, determined to abandon these indictments, both against Edgar, and against the informant. And accordingly, of this date, new indictments were served.

April 1817.

On the 19th of May, Edgar was put to the bar, and was required to plead to the new indictment. But as the diet had not been deserted on the former indictment by any interlocutor of your Lordships, an objection on this ground was stated; and your Lordships deeming it necessary to appoint a search for precedents in the records of the Court, the diet was adjourned till the 26th May. On that day, your Lordships determined that the new indictment was well served, but that the pannel was not bound to plead to it, until an interlocutor deserting the diet on the former indictment should be pronounced by your Lordships. Such an interlocutor having been accordingly pronounced, Edgar pleaded *not guilty* to the second indictment, and your Lordships continued all the diets of Court till the 2d of June.

On the 2d of June, the informant, Andrew M'Kinley, was brought up for trial on the *second* indictment. After a similar interlocutor as in the case of Edgar, deserting the diet on the first indictment, had been pronounced, the informant pleaded *not guilty*, and his counsel then stated various objections to the relevancy of this second indictment. It was stated, that it was still liable substantially to all the same objections which had been urged against the former indictment. The prosecutor had indeed thrown out the direct allegation of a traitorous conspiracy; but he had still libelled, that the pannel did "wickedly, maliciously, and *traitorously* administer, or cause "to be administered," &c. whereby there was still a direct attempt to prove treason under this indictment for a felony only. The oath was recited in the precise same terms as in the former indictment; and then the libel proceeded, "which oath, "or engagement, or obligation, to the foregoing purport, did "bind, or did purport or intend to bind, the persons taking "the same to commit treason, by effecting, by physical force, "the subversion of the established government, laws, and con- "stitution of this kingdom, and especially by obtaining an- "nual parliaments and universal suffrage by unlawful and "violent means."

The argument on the general relevancy was resumed at great length, and new considerations were suggested, shewing that this indictment was, if possible, more irrelevant than the former. Your Lordships at the same time called the atten-

tion of the counsel to a particular objection to the form of the minor proposition, in stating the particular occasions on which the alleged oath or obligation had been administered, where it was described as an oath not *purporting* or *intending* to bind, &c. but "*binding* the persons taking the same to commit "treason, as said is." Your Lordships wished to receive informations on the whole general points which had been argued. But you expressed decided opinions; that the indictment was bad in the point last mentioned, and also bad in the use of the word *traitorously* instead of *feloniously*.

In consequence of the opinions thus intimated, his Majesty's Advocate moved your Lordships to desert the diet on this second indictment *pro loco et tempore*, reserving to him to raise a new indictment for the same offence. Your Lordships accordingly pronounced such an interlocutor.

Thereafter, in the same day, a petition was presented by the Lord Advocate, which stated, "That your Lordships have "this day been pleased to desert the diet against *Andrew* "*M'Kinley*, present prisoner in the castle of Edinburgh, "accused as in the indictment, the diet whereof has this "day been deserted, and *who* stood committed as *guilty* "of the *crimes of high treason*, and *with a treasonable conspira-* "*cy* to obtain annual parliaments and universal suffrage by "physical force, *and administering* unlawful oaths, *binding* "*himself*, under pain of death, to the accomplishment of these "purposes, the *administering* of which oaths is a capital fe- "lony by the statute of the 52d of the King, c. 104., which "*crimes* the said person is charged with having committed at "Glasgow, and in the vicinity thereof, in the months of No- "vember and December, 1816, and January and February, "1817, *which therefore* makes this application necessary for a "new warrant," &c. And it prayed your Lordships "to "grant warrant to commit the said Andrew M'Kinley to the "castle of Edinburgh accordingly." Your Lordships did then grant warrant to apprehend the informant, "and to com- "mit him prisoner to the castle of Edinburgh, therein to be "detained till thence liberated in due course of law." The informant does not at present stop to take notice of the extraordinary terms of this last application. It is quoted, only that your Lordships may be aware, that the informant still stands committed for treason, and for a treasonable conspiracy, as well as for the crime of administering unlawful oaths under the statute.

Of this date, a third indictment was executed against the informant; and, on the 23d of June, he was brought to the bar, and pleaded not guilty. His counsel were prepared to June 7, 1817.

argue the same general objections which had been stated to both the former indictments, and to maintain, that this last was, if possible, the worst of them all. But it being understood that your Lordships were to order informations, it was thought unnecessary to occupy the time of the Court with any debate; and your Lordships pronounced the following order: "Ordain parties procurators to give in informations upon the "relevancy of the indictment, to the clerk of Court, in order "to be recorded; the prosecutor to give in his information on "or before Thursday next, and the procurators for the pan-"nel to give in his information on or before the 9th day of Ju-"ly next: Continue the diet against the pannel till Monday "the 14th day of the said month of July, and ordain all con-"cerned then to attend, each under the pains of law, and the "pannel in the mean time to be carried back to the castle of "Edinburgh." The prosecutor's information was accordingly lodged on the 26th June; and the informant is now to enter into the consideration of the relevancy of this third indictment.

The prosecutor states, that he has no hope of suggesting any new views of the case, and that he will not think himself justified, by the inducement of novelty, in abandoning those grounds on which he has always been of opinion that the indictment ought to pass to the knowledge of an assize. It must be admitted, that the learned prosecutor has been sufficiently steady in adhering to most of his own ideas on this matter, and that he has not furnished your Lordships with many new lights on the most important questions which arise. Yet neither his indictment, nor his information, is altogether destitute of novelty. There are propositions maintained so very new and remarkable, that, though they were indeed suggested in a *viva voce* pleading, the informant scarcely expected that they would have been deliberately put on the record of the Court; and after having twice indicted the informant, founding on an oath of the terms or purport specially set forth, he has found out, that one objection to the relevancy of those indictments is at once removed by the simple expedient of *changing the fact*. "The argument is now in a great measure abolished by *the* "*introduction of both* the words into the new indictment." In the middle of the oath alleged to have been administered, the words are changed, and, instead of the terms, "either by mo-"ral or physical strength," your Lordships have now these words, "either by moral or physical strength, *(or force!")* What may be the effect of this addition, the informant may perhaps afterwards inquire. But the prosecutor has at least the merit of some novelty in this expedient for curing an ob-

jection of relevancy, by adapting the fact to his own argument, though he had not ventured so to state it in any of the former indictments.

But the informant is much more anxious to satisfy your Lordships on the very important questions which occur in this case, than to analyse minutely the line of argument adopted by the prosecutor. He will have occasion to advert to some of the extraordinary positions maintained; and, with great submission, they appear to him in a great measure to reduce the plea which they are found necessary to support to an absurdity in law.

To your Lordships, who are so well acquainted with the subject, it might seem to be a very unnecessary subject of inquiry, to consider what is the real meaning of a question on the relevancy of an indictment. But the manner in which the case has been treated by the prosecutor renders this indispensable, as the basis of the whole discussion; for he appears to have entirely lost sight of the fundamental principles of a Scotch indictment, as well as of the powers and duties of your Lordships in considering it.

The indictment is in the form of a syllogism. The *major* proposition lays down the general nature of the crime in the abstract, with its qualities and aggravations. The *minor* proposition defines the *particular species* of that crime with which the pannel is charged, and details the *facts* from which his guilt is to be inferred. The *conclusion* is, that, the charge being proved, the punishment fixed by the law shall be inflicted.

Every indictment must shew *on the face of it* a plain relevancy, otherwise it cannot be sent to trial at all. Your Lordships must be enabled to judge, whether the specific charge, meant to be made against the pannel, will amount to the crime charged in the major proposition; and you must be enabled to judge, whether the particular facts alleged are of such a nature as to amount to that specific charge. The pannel has a right to be informed, in the minor proposition, of the precise accusation that is made against him, and also of the leading facts on which it is founded. But it is not merely for the pannel's information that the specification in the minor proposition is required. It arises from the very principle of such an indictment, and the rules which govern the trial of crimes in this Court. The relevancy of the charge belongs to your Lordships, and not to the jury; and the prosecutor has it not in his power to take the cognizance of this relevancy out of the hands of the Court.

There is, in this respect, a distinction between the practice of this Court, and the practice of the criminal courts in England, which it seems to be of some importance to remember. In England, the indictment is drawn comparatively in a very general form; and it is competent, even after the verdict of a jury finding the prisoner guilty, to make a motion in arrest of judgment, on the ground of errors, or of general irrelevancy, in the indictment in point of law. This is the usual form of trying questions of relevancy; and, accordingly, with few exceptions, it is scarcely ever the practice to object to the indictment *in limine*.

Your Lordships know, that the practice is essentially different in this Court. The interlocutor of relevancy pronounced by the Court determines the general law of it; and though the pannel is generally permitted to use whatever arguments he thinks fit to induce the jury to acquit him, he can never afterwards plead to the court any objections to the relevancy of the indictment. A *verdict* of *guilty* finishes the case for ever; and if the pannel, so convicted, still thinks himself in any way aggrieved, he has no remedy but in the mercy of the Sovereign.

This being undeniably the rule of the law of Scotland, it must be evident, that it creates an absolute necessity, not only for the utmost precision and accuracy in the statement of the charge in the indictment, but for a considerable minuteness of detail in setting forth the facts on which the charge is founded. It must be so stated, that not only the pannel may be aware of the precise nature of the charge against which he has to defend himself, but the Court may be enabled to form a correct opinion on the relevancy of the whole accusation. It will not do to wait for the disclosure of the case in evidence. The Court must, in the first instance, *see a clear relevancy on the face of the indictment*, by a distinct exposition of the specific nature of the charge, and of the leading facts.

It is certainly of no importance, what opinion shall be formed on the respective merits of these two modes of procedure. Your Lordships will probably be inclined to think, that the advantages of your own rule are sanctioned by a long course of experience, and that the inhabitants of this country have every reason to be satisfied with a system, which so effectually secures them against being put in hazard by irrelevant accusations, or by charges, the precise nature of which they do not know.

But it is self-evident, that the whole principle of this course of trial absolutely requires a great degree of precision in the minor proposition of the indictment. And accordingly, no

matter of law ever was more clearly laid down, or more rigidly adhered to, than the rule which imposes this necessity on all prosecutors has been in the laws of Scotland. Trite though the subject may be, the informant considers it to be indispensable to lay before your Lordships some part of Mr. Hume's statement on this matter.

After explaining the introduction of the minor proposition, which simply asserts that the pannel is "guilty actor, or art "and part, of the foresaid crime," Mr. Hume goes on to observe, "The second part of the charge, or subsumption, as it "is called, is introduced with the words 'In so far as;' and "consists, to describe it generally, of a narrative of the al- "leged criminal act, with the due specification of the time, "place, and manner of doing it, so as to *justify the preceding* "*affirmation of the pannel's guilt, and distinguish likewise this* "*particular charge from* ALL OTHERS OF THE SAME SPECIES, "and bring the pannel to the bar, sufficiently informed of that "whereof he is accused. Hume, vol. III. p. 301.

"I say, in the first place, that this part of the libel must "give such a history of the deed that has been done, *as shall* "*warrant the preceding affirmation of the pannel's guilt of the* "*crime which is stated in the major*, and is now referred to in "the subsumption of the minor proposition.' The author then goes on, at considerable length, to explain this point of law, that the *fact must amount to the crime charged* in the major proposition; and among other examples of the rule, he gives this: "On such a ground, among others, the Lords dismissed "a libel for *perjury*, which set forth the several articles of the "pannel's deposition, and affirmed that they were contrary to "the truth, but omitted to say, that the pannel swore these "things, '*knowing the same to be false.*" The informant shall presently take the liberty of quoting some other passages in a different part of Mr. Hume's work, on this very material case of trial for *perjury*. p. 302.

But after explaining this branch of the rule, he goes on to the other: "I have said, in the second place, that a libel is not good, 'unless it give *such an account of the criminal deed as may* "DISTINGUISH THIS PARTICULAR CHARGE FROM ALL OTHER "INSTANCES OF THE SAME SORT OF CRIME, and thus bring "the pannel to the bar, sufficiently informed of that whereof "he is accused. Otherwise the purpose would not be fulfilled "which the law entertains, in ordering the pannel to be serv- "ed with a copy of his libel, and allowing him so many days "to make preparation for his defence.' Afterwards he says, "And indeed, so undeniable is the equity of this maxim, that "it seems to have been uniformly observed in the trial even of p. 310, 311.

" crimes against the state, and in the times the least re-
" markable for mild or impartial decisions in that class of
" cases." Then follows a detailed illustration of the point.
p. 316, 317. The informant can only select a few passages: " It is matter
" of substantial justice, and has been uniformly observed in
" the practice of later times, that the prosecutor shall *not* be
" held sufficiently to have explained himself, in charging the
" crime *by its technical appellation, and affirming that he, the*
" *pannel, did commit or was guilty of that crime*, against such a
" *person*, at such a *time*, and *place: He shall farther be obliged*
" *to support and justify this affirmation, with an account of the*
" *particular fact*; an account which takes notice of those lead-
" ing and peculiar circumstances of the deed, *which serve to*
" *distinguish it from other deeds of the same class*, and of which
" any spectator would naturally make mention, in relating
" what he had seen. In a case of murder, for instance, the
" libel shall not be good thus: ' Yet true it is and of verity,
" that you, the said A. B. pannel, are guilty actor, or art and
" part, of the said crime of murder, in so far as, upon the
" 10th day of April 1797, you *did kill and murder C. D. mer-*
" *chant in Edinburgh*, within his own dwelling-house, situated
" in the High Street of the said city of Edinburgh;' and so
" conclude, without communicating either to the judge or the
" pannel any farther particulars of the story. The reason is
" obvious: A murder might be committed on the person of
" C. D. at the time and place libelled, in many various ways, as
" by shooting, stabbing, strangling, poisoning, and so forth; and,
" *according as it is intended to prove one or another of these*
" *modes of slaughter, the pannel may have to take a different*
" *course towards his defence and exculpation.*'

Afterwards, " I may add, that the prosecutor is obliged to
" enter into such a detail, *for this farther and equally substan-*
" *tial reason, that* ' HE MUST OTHERWISE BE VESTED IN EF-
" FECT WITH THE ENTIRE COGNIZANCE OF THE RELEVANCY
" OF HIS OWN LIBEL, *a matter which belongeth not to him, nor*
" *even to the jury*, BUT TO THE COURT ALONE; and that he
" might thus force on the trial of such a charge, *which, to*
" *be dismissed as inept or irrelevant, needs only to be opened up*
" *and explained.* For under these general terms of *murder,*
" *rob, steal, and the like*, the prosecutor may conceal some
" nice and disputable, or perhaps some fantastical and extra-
" vagant notions of his own, such as are unknown to the law
" and practice of the land, &c.' Now, if the prosecutor be al-
p. 318. " lowed *thus to wrap up his case in mystery*, and keep the fact
" to himself which is the foundation of his charge, he for cer-
" tain gains his object of having his libel remitted to an assize;

" with whom, *if he can prevail to adopt his opinions on the sub-*
" *ject, how false and erroneous soever they be*, he may obtain a
" favourable verdict, and *thus constrain the judge to pass sen-*
" *tence on the prisoner, contrary to the law and the justice of the*
" *case.*

" And if this be true of such crimes as theft and murder,
" *much more does the same hold good of many other crimes,*
" *which are of a more complex or more subtile nature*, and
" with respect to which, unless elucidated with a full detail
" of the circumstances of the fact, no notion can well be
" formed whether the charge be pertinent or not. Take,
" for instance, the crime of *bribery.*" Among other exam-
" ples under this head, the author states the case of *perjury.*"
" The like discussion took place in the case of Lawson of p. 319.
" Westertown, on that article of his indictment for the crime
" of perjury, wherein he was charged with swearing falsely,
" that his title as a freeholder was *not nominal or fictitious, nor*
" *created* for the purpose of enabling him to vote for a mem-
" ber to serve in Parliament. For, on this head, *finding*
" *it adviseable to be more reserved and cautious than on the other*
" *articles of the charge*, the prosecutor had failed to set forth
" any such detail of facts and circumstances, from which it
" could be gathered, either what meaning he himself attached
" to this *mystical and litigious phrase of a nominal and fictitious*
" *title*, or which might *enable the judge to discern* whether he
" were correct or not in his notions on that subject. In con-
" sequence, this part of the libel, and this alone, was found
" not to be "so qualified as to import a relevant charge of
" perjury, upon which the pannel may or can be remitted to
" the knowledge of assize."

The author concludes the whole of this matter with ob-
serving, " The truth is, that the best confirmation of the p. 320.
" rule, next to the obvious justice of the thing itself, *is the uni-*
" *form observance of it in the practice of later times*, which has
" hindered many controversies of this sort from arising in
" Court, and is itself a daily testimony to the tenor of the
" law."

Now, though it is true that there are some exceptions from the strictness of this rule, arising from the necessity of the case, and though there are also limits to the rule, so that an unreasonable degree of minuteness shall not be required, the rule itself is fixed and peremptory, and the principles on which it depends are both clear in themselves, and such as demonstrate the necessity of it to the substantial justice of every trial in this Court. The informant hardly thinks it necessary to make any apology for the fulness of his statement on the

subject, because he apprehends that it is substantially denied (though indeed admitted in words) throughout the information of the prosecutor.

The major proposition of this indictment consists entirely in a recitation of the clauses of the statute of the 37th of the King. The material part is in these words, "that every per-" son who shall, in any manner or form whatsoever, admini-" ster, or cause to be administered, or be aiding and assist-" ing at the administering of any oath or engagement, *pur-*" *porting or intending to bind the person taking the same to* " *commit* ANY *treason, or murder, or* ANY *felony punishable* " *by law with death*, shall, on conviction thereof by due " course of law, be adjudged guilty of felony, and suffer " death as a felon, without benefit of clergy."

The general crime here raised into the rank of a felony, consists in the administration of an oath. But the quality of the oath, in which the essence of the crime consists, admits of the great varieties, and is described in the statute by a reference to certain other general denominations of crimes. It must be an oath *purporting or intending to bind* the party taking it to certain things; 1*st*, Purporting or intending to bind him to commit *any treason*; 2*d*, Purporting or intending to bind him to commit *murder*; 3*d*, Purporting or intending to bind him to commit *any felony*. The crime of the statute is not defined to any one of these obligations, nor does it require them *all* to make up the statutory offence. Each is a separate sort of offence of its own character, all under the same enactment of the statute, and all consisting in the administration of the oath.

But there are *many* sorts of treason; there are *many hundreds* of different felonies; there are murders which amount to petty treason, and murders of a different sort; but though the statute mentions murder, merely according to the uniform practice in all such English statutes, it does not speak of *any* murder, as in the other cases. The statute does not distinguish the varieties of treasons and felonies. It provides, that the administation of an oath, purporting or intending to bind to commit *any* treason or *any* felony, shall be felony; and it leaves the precise definition of the particular crime to be settled according to the fact in each case. If *the oath* purports or intends to bind to commit *burglary*, that is the crime in that case; or to commit *rape*; and so of all the numerous *felonies* existing in the law. In the same manner, if it purports or intends to bind to *compass the king's death*, the administration of the oath having this *purport* or *intendment* is the statutory crime in that case. If it imports or intends to bind *to levy*

tear, that is the essence of the crime in that case. If it purports or intends to bind to counterfeit the king's coin, that is *the treason* in that case, the obligation to commit which is the basis of the offence. And so of all the other *eight* treasons which exist in the law.

It may be known to your Lordships, that the three great genera of crimes in the law of England are *Treason*, *Felony*, and *Misdemeanour*. Every thing falls under one or other of these denominations. There are inferior classes; and sometimes the pleas of the crown are stated separately, as in this statute *murder* is put as distinguished from felony, the informant believes, according to the constant practice in such English acts, and perhaps in this case, with some view to the case of those murders which are *petty treason*. But, in general, *treason*, *felony*, and *misdemeanour*, are the *genera*, and comprehend every thing.

The same fact, which is properly a treason, may be also a felony. But, *as a treason*, it is not comprehended under the denomination of *felony*. The same fact may be at the same time treason and felony; for example, to murder the King is an overt act of compassing the King's death, and so *treason*, and also *felony* in the *murder*. But the crime of high treason is an entirely distinct class; and your Lordships will hereafter have to consider, whether, in the case of the same fact involving both crimes, the felony does not necessarily merge in the treason. With this point the informant does not at present interfere. In the mean time, it is clear, that *treason* is used constantly throughout the English books as a *generic* term, just in the same manner as the term *felony*, and one of the plainest illustrations is to be found in this statute, and in the very words founded on, where it speaks of *any* treason, or *any* felony, precisely on the same principle, referring to any one of the numerous treasons, or the still more numerous felonies, which exist in the law.

The informant shall venture, hereafter, to enter a little more fully into the subject of the treason law. But at present, he may be allowed to observe, that the separation of the different sorts of treason, or rather of *the different treasons*, is so clear, that the valuable statute of King William for regulating trials of treason, &c. lays down a rule now in strict observance, that no person shall be indicted, tried, or attainted of high treason, "but upon the oaths of two lawful witnesses, either *both* to "the *same overt act*, or one of them to one, and the other of "them to another, overt act of THE SAME *treason*." And Sir Michael Foster, in quoting the statute, prints the words "*the same treason*" in italics, to mark his clear understanding,

7th William III. c. 3.

Foster's Crim. Law, 233.

that it must be two witnesses to separate overt acts of *the same species* of treason, as *a distinct crime*. In the same manner, it is provided, by the 4th section of the same statute, that if "*two or more distinct treasons*, of *divers kinds*," be alleged in one indictment, one witness produced to prove "*one of the treasons*," and another witness produced to prove another, shall not be deemed two witnesses "*to* THE SAME *treason*."

The statute of the 2d and 3d Anne, c. 20. makes it *high treason* for any officer or soldier to hold correspondence with any rebel or enemy, or to give advice, &c. to the king's enemies; and it makes it *felony* to raise mutiny or sedition in the army, &c. &c. And, by the 36th section of that act, it is provided, that the *treasons* and *felonies* before mentioned may be inquired of, &c. in the manner there pointed out. The treasons and the felonies are constantly spoken of in the *plural* number, as generic descriptions of two *classes* of crimes.

The statute of the 7th Anne, c. 21. § 3. the very act which extends the treason law of England to Scotland, speaks throughout of *treasons* in the plural number; and it specially provides, that the justice-court shall inquire of *all high treasons*, &c.

In general, therefore, there cannot be the smallest doubt, that, in the phraseology of the English law and statutes, *treason* is a generic term, descriptive of a class of crimes; and that, when the legislature speaks of *a* treason, or *any* treason, it means a *particular sort* or *description* of treason, or *any one* of *all* the particular species of the general crime.

But the plainest illustration for the present question is to be found in the other branch of the same clause of this statute, "or *any* felony punishable by law with death;" which, in this statute, is put exactly on a footing with "*any* treason." There are some hundreds of felonies in the law of England, and there are very many felonies punishable with death in the law of Scotland. But it is impossible for any court to imagine, that, when this statute speaks of *any felony*, it means any thing more than to describe generally the nature of the offence, the administration of the oath binding to commit which shall be deemed felony, assuming that the particular felony, or particular species of the crime meditated, shall be defined in the indictment on which the charge proceeds.

Thus, the major proposition of this indictment libels a crime, consisting in the administration of an oath, binding the party taking the same to commit certain generic crimes, of which there are a great variety of species. The essence of the statutory offence must always be resolved into the thing,

which the oath administered purports or intends, or at least is *alleged formally to purport* or *intend*, to bind the party taking it to do. It is in that only that the criminality does or can lie; and it is quite apparent, that the statute is so very general in its description of that thing or object, and comprehends so many particular cases, and particular descriptions of crimes, that it of necessity supposes a particularity of statement to be given in the indictment in each case.

The prosecutor has thought fit to pass over this part of the case altogether without notice. But your Lordships, after attending to the true nature of the statute, which forms the whole major proposition of this indictment, will have no difficulty in perceiving the full force of it in relation to the material questions which remain on the minor proposition.

The informant is here immediately led into the several important questions, on which the relevancy of this indictment depends. If the reasoning of the prosecutor is well founded, it would be very unnecessary to enter on any such inquiry. For, as far as the informant understands the statement in the information, it is, according to him, quite unnecessary to give your Lordships an opportunity of judging of the relevancy of the indictment at all. He gives your Lordships his theory in a short compass. "The prosecutor "knows no addition that can make the syllogism more per- "fect. *Maj.* The administering an oath of a particular "description is a crime. *Min.* You did administer *the* "*following oath: Ergo*, You ought to be punished." And elsewhere the prosecutor says, that "in this stage of the pro- "cess, every thing is presumed to be done *wickedly* and *mali-* "*ciously*, as libelled. And the question is, If all these things "are as stated by the prosecutor, ought they to be followed by "punishment? So clear is this rule, that *things in themselves of* "*the most innocent description*, if libelled to be done *wickedly*, "and *maliciously*, or for the accomplishment of some illegal "purpose, are daily found relevant to infer the pains of law."

Prosecutor's Inf. p. 16, 17.

Inf. p. 4.

With all deference, the informant must be allowed to say, that, in his humble apprehension, a more complete confusion of legal ideas has been rarely expressed in the same number of words. According to the prosecutor's dialecticks, this would be a complete legal syllogism, which your Lordships must of necessity remit to a jury.. "*Major*. The administering of "an oath, purporting or intending to bind to commit any "treason or felony, is felony. *Minor*. You did *wickedly* "and *maliciously* administer an oath of the following purport, "which purport is, that the party taking the same shall walk

" one mile every morning. *Ergo*, You must be punished " with death." The prosecutor plainly assumes, that your Lordships are not to judge of the relevancy of the minor proposition. If he shall only be pleased to state, that that which he asserts to have been done was done *wickedly* and *maliciously*, your Lordships must take it for granted that it *amounts to the crime libelled* in the major proposition, and *is a sufficient description* of the *specific offence*, and must leave it to the jury to determine whether the prosecutor shall prove any precise criminal act or not. If the informant has any comprehension of this, it is precisely a plea, directed to the object of *taking the question of relevancy entirely out of the hands of the Court*. It is just that case stated by Mr. Hume, where the prosecutor wraps his case up in mystery, in hopes of getting it passed to an assize; and then, if he can prevail on them, rightly or wrongly, to give him a verdict, compels your Lordships to pronounce sentence against law and justice.

But an indictment under this statute cannot be framed on this principle. Your Lordships must have the means of judging of the relevancy of the minor proposition: and you cannot send it to trial, on any such random assumption of what may by possibility turn out, as the prosecutor is pleased to present to you. It is perfectly true, that, in the question of relevancy, the facts averred in the indictment ought to be taken as true. But the mere averment of a *felonious intention* will not make relevancy, if the fact stated is either not in itself relevant, or *not sufficiently specific, to enable your Lordships to judge of its relevancy*.

In order to sift more carefully the question concerning the relevancy of the minor proposition in this case, it is now necessary to consider the particular objections which the perusal of it immediately presents. And the informant shall here take the liberty of inverting the order adopted by the prosecutor, and of considering, 1. Whether the prosecutor was bound to state *the particular treason*, which he means to allege that the oath libelled on *purported* or *intended* to bind the parties taking it to perpetrate. 2. Whether there is any averment in this minor proposition, which can in law be taken as an averment that the pannel did administer an oath, purporting or intending to bind the parties to commit any particular treason; and, 3. Whether *the oath libelled on*, is an oath *purporting* or *intending* to bind the party taking it to commit treason. The informant adopts this arrangement, for reasons which will presently be very evident to your Lordships. For

he apprehends, that the objection to the relevancy of this indictment is not an objection of mere form, but an objection which enters into the substance of the whole charge. The prosecutor *knows*, that he dare not state his indictment according to correct principles of relevancy, without shewing at once that, *in the substance of it*, it cannot be maintained. If he did not know this, it would be the easiest thing imaginable to frame a relevant indictment, as the informant will presently shew. But the prosecutor is now striving for the very object which has been uniformly reprobated in the history of the Court, to take the relevancy out of the hands of your Lordships, and to obtain the chance of a verdict from a jury, *on erroneous notions of the nature of the charge*, and vague inferences from facts that are totally inapplicable to it. The question concerning the purport of *the oath* is a question of great importance; and if the informant does not mistake, the prosecutor has hazarded propositions on the subject of the most untenable and extravagant nature. But it seems to him to be first of all material, to see, what it was necessary for the prosecutor to state, in order to qualify and define the charge and allegation of fact in the minor proposition; and how far, independent of the terms of the oath, he has complied with the rules of law in that particular.

1. The informant humbly maintains, that it was incumbent on the prosecutor, in the minor proposition of the indictment, to specify and define *the particular treason* to which he alleges the oath, said to have been administered, purported or intended to bind the party taking it.

As the informant considers this to be a fatal objection to the indictment, and an objection which, though already twice distinctly explained, the prosecutor has found himself unable, by any amendment, to remove consistently, it must be presumed, with his knowledge of the facts of the case, the informant must beg the indulgence of your Lordships in explaining it at considerable length.

If the foundation of this prosecution were the administration of an oath, alleged to purport or intended to bind the party taking it to commit *a felony*, the informant presumes that even the prosecutor would scarcely dispute, that the particular felony must be specified in the indictment. He has indeed ventured to put the case of an oath, "binding to commit *treason generally*, or, in the words of the act itself, '*any* "*treason*;" and has boldly maintained, that it would be a sufficient libelling to state that fact. And he has also said a great deal about the impossibility of stating facts which were only in intention, and never took place. These doctrines the

informant shall presently consider. But the prosecutor has entirely avoided the case of the oath alleged to purport to bind to commit *a felony*, and has not attempted an answer to the irresistible illustrations suggested in the hearing on this point; and to this, in the first place, the informant requests the attention of your Lordships.

Supposing, then, that an oath had been administered, which the prosecutor thought purported to bind the party to commit *a felony*: How must he lay this in the minor proposition of the indictment? 1. If he were to lay it as the prosecutor suggests, in the words of the statute, would it not be manifestly no charge at all? "In so far as you did on the "day of &c. administer an oath, purporting, "or intending to bind the party taking it to commit *any* "*felony* punishable with death." By such a charge, the pannel would be left to conjecture, *which of five hundred felonies* he was accused of having bound the party to commit; and it is quite unnecessary to say, that it would be utterly irrelevant. 2. If the prosecutor libelled, that the oath purported to bind "to commit *felony*," or "*a* felony," or "*some* fe-"lony;" the indictment would in all these cases be plainly bad, as in fact containing no allegation of the pannel having administered an oath, purporting to bind to the commission of *any specific* or *known* crime.

When this is stated in a general view, the truth of the proposition cannot possibly be denied. No prosecutor would have the face to present such an indictment to the Court. But the sort of reasoning which the prosecutor here applies to the case of treason, ought to afford him an equally good plea, in the case of an oath alleged to bind to commit felony; and the informant does not know, that he will not maintain it. He may be supposed to state, that, besides alleging that the oath purported to bind to commit felony, he had recited the purport of the oath itself, and that from that purport, or the meditated acts implied in it, the particular felony intended *might by possibility be collected*; and that it is the province of the jury to determine, whether it is an oath binding to commit felony or not. The informant firmly believes, that such reasoning, if applied to the case of felony, would only require to be stated to shew the impossibility of maintaining it. But the informant shall take the liberty of observing, that, even if the precise *fact* which the oath was alleged to bind the party to commit were set forth, the indictment would be clearly bad, if it did not state *the nature of the felony*, the obligation to commit which was to be proved by the contemplation of the fact, to the performance of which the oath purported to bind.

The act which constitutes, or affords the evidence of a felony, is not the felony itself. There may be many qualities in the same act, which essentially vary the legal denomination of the crime arising out of it. The same act may be evidence of many different felonies. And of this no better illustration can be given, than that which was suggested in the debate. Suppose the prosecutor had libelled, that the pannel had administered an oath, purporting to bind the party to commit a felony, and that he had explained this, by stating, that he had administered an oath, purporting to bind the party to carry away a certain quantity of corn from the place where it was deposited, and deliver it to a certain shipmaster: When the pannel objected to the relevancy of such an indictment, the prosecutor might answer as he does here—I have libelled the fact which took place, that the oath was administered, and I have libelled that it was done wickedly and feloniously: Let me go to the jury, and I will satisfy them, that the fact which the party was bound to do by the oath was an act of *some felony or another*. If the Court permitted this, the pannel might come into Court, believing that the prosecutor meant to say, that the obligation intended was to *steal* the corn, and might come prepared to prove that it was his own property. He might then find, that the prosecutor did not intend to allege *theft*, but *fraudulent bankruptcy*. Suppose the pannel were even prepared for this charge, and ready to prove that he was not bankrupt; he might then find, that the prosecutor meant to allege an engagement for abstracting the corn from a storehouse, and so to commit felony, under the statute of 11th Geo. III. He might be prepared for this also, and able to shew that the case was not within the statute. But, though prepared for all *these* felonies, he might find the intention of the prosecutor to be, to prove, that the oath purported or intended to bind the party to deliver the grain to a shipmaster who had been residing six months in France, and so to commit felony by holding intercourse with a person in that situation, contrary to the non-intercourse act of the Geo. III.

But this is only an example of what runs through the whole law. The statutory felonies in England amount to many hundreds, and have been constantly increasing. Many of them are distinguished from one another by the nicest shades of difference, though consisting in the same direct act. But, unless the prosecutor were bound to state, what denomination of crime he alleged the oath to bind the party taking it to commit, he might just as well be permitted to say in general, that it bound him to commit felony in the abstract, or *any*

felony, according to the ingenious supposition of the prosecutor. The prisoner could only guess at the nature of the charge intended, and could only grope in the dark for the circumstances most material for his defence.

The case of felony is indeed so very clear, that the prosecutor has not ventured to touch it. An indictment never could be sustained, which did not specify the particular species of felony which the prosecutor alleged the oath to bind the party to commit. The informant readily admits, that the prosecutor is entitled to assume the truth of the *facts* specially set forth. He only says, that the indictment must be sufficient *in point of averment*, and that, first of all, there must be a distinct *allegation* that the oath did purport or intend to bind to the commission of *a specific felony*. To say, that it bound to the commission of felony in the abstract, would be altogether nugatory, and could not be sent to a jury under any circumstances.

But the prosecutor directs himself solely to the case of treason; and, because it is more a matter of common language to speak of treason as a particular offence, than to use the same expression as to felony, he presses your Lordships to the adoption of a rule in the enforcement of this statute, in the case of an oath alleged to bind to the commission of a treason, which would be totally inadmissible in the case of an oath alleged to bind to the commission of a felony. But this is a very unsatisfactory way of resolving either the legal principle, or the substantial justice of this question. The statute here speaks of "*any* treason," and of "*any* felony," by phraseology identically the same: In both, it uses technical legal terms: And the effect of it must be resolved, not by any false impressions arising from the practice of familiar discourse, but by the true legal characters of the denominations employed. And whenever your Lordships come to consider, what treason really is in the contemplation of law, and what the legislature means, when it speaks in a statute of an obligation to commit *any treason*, the informant believes it will be found, that it is by far the clearest case of the two; and that, if the prosecutor would be bound to specify *the* felony, to the commission of which he alleged an oath to bind, it is still *more* necessary, that he should be required to specify *the* particular treason, to which he alleges the oath in this case purports to bind those to whom it is said to have been administered.

Here the informant finds himself in a very unexpected difficulty. The law of treason is matter of English law. It depends on statutes, and on the *dicta* and decisions of the judges and lawyers who have written and spoken on the sub-

ject. And the great body of this law of treason lies in the work of Sir Matthew Hale, which, from its first appearance to the present moment, has been looked up to as the foundation of every thing else that has ever been written or said on this most interesting branch of law. But, to the surprise of the informant's counsel, and they believe as much to the surprise of your Lordships, the authority of that great judge and lawyer, equally profound in the learning of his profession, incorrupt in the exercise of his public functions, and most excellent in every private quality which can add dignity and value to the brightest talents, has been at once cast aside by the learned prosecutor, as of no weight in a question of treason; as disregarded by the judges of England, and as at once put down by the supposed silence of Lord Loughborough, and by a few passages selected from the works of Sir Michael Foster, Serjeant Hawkins, and Mr. Hume. The informant never heard, that the name of Lord Loughborough could be mentioned in a question of law, in opposition to that of Lord Hale. The treatise of Sir Michael Foster is undoubtedly of the highest authority. But, though on some few particular points, that great judge differs from the statements of Lord Hale, the truth is, that his discourse is nothing more than a short commentary on the detailed law of treason, as laid down by Sir Matthew Hale, which is throughout referred to, as the basis on which every succeeding writer must build whatever additions or changes the progress of time has suggested.

Judge Foster was a great lover of the Revolution establishment; and he has told us, in his preface to his first edition, that he attributed any mistakes into which Lord Hale had fallen, chiefly to the opposite prejudices which he had early received on that subject. But he never speaks of him but with the most profound respect and veneration. "Why, "therefore, may not a good subject, be it in season or out of "season, caution the younger part of the profession against "the prejudices which the name of Lord Chief Justice Hale, "*a name ever honoured and esteemed*, may otherwise beget in "them? I, for my part, make no apology for the freedom I "have taken with the sentiments of an author, *whose memory* "*I can love and honour*, without adopting any of his mistakes "upon the subject of *government*. It cannot be denied, and "I see no reason for making a secret of it, that the learned "judge hath, in his writings, *paid no regard to the principles* "*upon which the revolution and present happy establishment are* "*founded*. The prevailing opinions of the times in which he "received his first impressions, might mislead him."—"He "was undoubtedly *very great in his profession*; and, which

" raiseth even a great character infinitely higher in point of " real merit and esteem, he was, in every relation of life, a " good man; though the rectitude of his intentions, while " under the strong bias of early prejudices, might sometimes " betray him into great mistakes." In another part of his work, he has said expressly, in allusion to Hawkins, " This " has been urged with some advantage by a good modern " writer on the crown law, *the best we have* EXCEPT HALE." Thus plainly setting Hale at the head of all the writers on the crown law.

Foster, p. 207.

But the informant has said too much on this subject. The reputation of Sir Matthew Hale as a lawyer, and his authority on the law of treason, will probably survive the cases of Edgar and M'Kinley. But it is worthy of remark, that the tendency of the prejudices to which Foster alludes, was a tendency, not in favour of the persons accused of treason, but against them, and in support of prerogative; and the only passage which the prosecutor has condescended to quote from Hale, is a passage which, whether just or not, is certainly of this tendency. The prosecutor will hardly obtain much benefit, in this view, by applying to *Sir Michael Foster* to set aside the authority of Hale.

It is, however, of more importance to take notice, that, in truth, the most material point in which Foster's statement of the law of treason differs from that of Hale, is precisely that point to which the passages quoted from Foster by the prosecutor relate; and it is remarkable, that, in that disputed question, Hale and Foster each took the side which was likely to be the result of his own ruling opinions. The point itself, so far as it is here material, shall be presently attended to.

It is known to your Lordships, that, previous to the statute of the 25th Edward III., the law of treason was extremely uncertain, so that, by means of the constructive treasons which were every day invented, or applied to particular cases, there was scarcely any breach of law or offence towards the government, which the spirit of party or of tyranny could not convert into a charge of high treason. Hale, after giving some examples, says, " By these, and the like instances that might " be given, it appears how uncertain and arbitrary the crime " of treason was before the statute of 25th Edward III., " whereby it came to pass, that every offence that was, or " seemed to be, a breach of the faith and allegiance due to " the king, was, by construction, and consequence, and in- " terpretation, raised into the offence of high treason. And " we need no greater instance of this multiplication of con-

Hale, P. C. p. 82, 83.

" structive treasons, than the troublesome reign of King Rich-
" ard II., which, though it were after the limitation of trea-
" sons by the statute of 25th Edward III., yet things were
" so carried by factions and parties in this king's reign, that
" this statute was little observed, but as this and the other
" party prevailed, so the *crimes* of high treason were in a man-
" ner arbitrarily imposed, and adjudged to the disadvantage
" of that party which was intended to be suppressed," &c.

Hale states a most remarkable example of this, which he undeniably gives as an instance of direct violation of the statute of Edward III. In the 10th Richard II., a commission for the redress of grievances was granted by the King, on the importunity of some of the great Lords and of the Commons, to the Archbishop of Canterbury and others, which was thought prejudicial to the King's prerogative. After this, the King called together the two chief justices, Tresilian and Thirlinge, and other judges, and put various questions to them; among others this: " Qualem pœnam merentur, qui *compulerunt sive* Hale, P. C.
" *actarunt regem ad consentiendum confectioni dictorum statuti*, or- 84.
" dinationis, et commissionis? Ad quam questionem, unani-
" miter responderunt, *quod sunt ut proditores merito puniendi.*'
There were eight other questions put to these judges, to which it is unnecessary to refer. It will be observed, that the crime attributed in the above question to the persons alluded to, was, that of compelling or forcing the King to consent to a certain statute; and there could be no doubt, that that act was an *overt act* of high treason. But these judges took it upon them to say, that it was *in itself a treason.* And your Lordships will now see, what Hale states concerning the result of these opinions. " This extravagant, as well as extrajudicial decla-
" ration of treason by these judges, gave presently an universal
" offence to the kingdom; for presently it brought a great in-
" security to all persons, and the next Parliament *crastino pu-*
" *rificationis* 11th Richard II., there were divers appeals of
" treasons by certain lords appellors, wherein many were con-
" vict of high treason under *general words* of *accroaching royal*
" *power*, SUBVERTING THE REALM, &c. and among the rest,
" *those very judges, that had thus liberally and arbitrarily ex-*
" *pounded treason in answer to the king's questions, were for that*
" *very cause adjudged guilty of treason*, and had judgment to be
" hanged, drawn, and quartered, though the execution was
" spared; and they having led the way by an arbitrary con-
" struction of treason not within the statute, they fell under
" the same fate by the like arbitrary construction of the crime of
" treason." Accordingly, all these judges were banished to Ire- State Trials,
land, except Tresilian, *who was executed according to the judg-* I. p. 13, 14.

ment. Hale states, that the tide again turned, and by the 21st Richard II., the state of the matter was reversed; yet that act was afterwards repealed by the 1st Henry IV.; and

Hale, P. C. 266. Hale adds, "Though the statutes of 1st Edward VI. and 1st "Mary, have taken away those treasons, which either the sta- "tute of 11th Richard II. or 1st Henry IV. had introduced, "more than were in the statute of 25th Edward III. yet it hath "*not* taken away the efficacy of the Parliaments of 11th Ri- "chard II. and 3d Henry IV. *as to their declarations, that the* "*extrajudicial opinions of those judges were false and erroneous;* "*but in that respect the Parliaments of* 1st Henry IV. *and* 11th "Richard II. *are of force, as to the* DAMNING OF THOSE EX- "TRAVAGANT AND UNWARRANTABLE *opinions and declara-* "*tions.*' In concluding the chapter on "Treasons at the "common law, and their uncertainty," Hale, referring to those examples in the reign of Richard II., says, that, from such

Ibid. 86. instances it appears, "How dangerous it is to depart from the "letter of that statute, and to multiply and enhance crimes "into treason by *ambiguous and general words*, as *accroaching* "*of royal power*, SUBVERTING of FUNDAMENTAL LAWS, *and* "*the like;* and how dangerous it is to depart from the letter "of that statute, and by *construction* and *analogy* to make trea- "sons, where the letter of the law has not done it: for such a "method admits of no limits or bounds, but runs as far as the "wit and invention of accusers, and the odiousness and detes- "tation of persons accused, will carry men."

The statute of Edward III. settled the law on this subject, by declaring all the treasons under defined and technical denominations; and Lord Hale announces them in the following

Ibid. 91. terms: "The several high treasons hereby declared are these: "1*st*, The compassing of the death of the King, Queen, or "Prince, and declaring the same by an overt act; 2*d*, The "violation or carnal knowledge of the King's consort, the "King's eldest daughter unmarried, or the Prince's wife; "3*d*, The levying of war against the King; 4*th*, The ad- "hering to the King's enemies, within the land or without, "and declaring the same by some overt act; 5*th*, The "counterfeiting of the great seal or privy seal; 6*th*, The coun- "terfeiting of the king's coin, or bringing counterfeit coin in- "to this realm; 7*th*, The killing of the chancellor, trea- "surer, justices of the one bench or the other, justices in "eyre, justices of assize, justices of oyer and terminer, in "their places, doing their offices."

Four other treasons have been introduced, 1*st*, With regard to papists; 2*d*, In relation to impairing the coin; 3*d*, Any attempt to obstruct the protestant succession, &c.; and

4th, By the 36th George III. c. 37. it is made treason *to compass, imagine, invent, &c. to levy war*, in order to compel the King to change his measures or counsels, or to put him under constraint, &c. But your Lordships will observe, that this last treason does *not* consist in any conspiracy *for obtaining an alteration of the law*, but expressly in a *conspiracy to levy war* for that purpose.

But the important point is, that by the law, as established by the act of Edward III., and acknowledged ever since, whatever additional treasons may be introduced, there is a complete separation of the different existing *treasons*, or *species* of the generic crime. There is a defined certainty in the denomination which belongs to each; and nothing whatever can be described as a treason, which is not one or other of the treasons thus established in the law. In short, the separation of all the treasons from one another is as complete by the statute, and has been as anxiously insisted on by every writer, and by every judge, who deserves to be quoted on the subject, as the separation of the different species of felony.

Now, one of the most important consequences of this accurate definition of the various treasons existing in the law, is, that there is an essential distinction between *every treason itself*, and the *overt act*, or *acts*, which will be sufficient to *support* or to *prove* the charge of it. Lord Hale goes through all the treasons which had been declared in his time, and explains separately, what that particular treason consists in, and what overt acts shall be sufficient to sustain the charge. For example, treating of treason in compassing the death of the king, queen, &c. he considers separately, "3. *What shall be* "said *a compassing or imagining of any of their deaths*;" and, "4. What shall be *evidence*, or an *overt act*, to prove "such imagining." Under the first of these heads, he says, that the words *compass* or *imagine* "refer to the purpose or "design of the mind or will, though the purpose or design "take not effect." After explaining this, he adds, "*Com-* "*passing* the death of the king is high treason, *though it be* "*not effected*; but because the compassing is only an act of "the mind, and cannot of itself be tried without some *overt* "*act to evidence* it, such an overt act is requisite to make such "compassing or imagination high treason. *De quo infra.*" And in a note it is said, "In so much that where the King "is *actually murdered*, it is the *compassing his death which is* "*the treason*, and *not* the *killing*, which is *only* an *overt act*. "—Keling, 8." This was in the case of the regicides; and no more plain illustration can be found of the distinction be-

Hale, P. C. 91, 92.

Ibid. 107.

Ibid. 108.

tween that which is treason in law, and that which is an overt act to prove it.

The treason by levying war, established by the 25th Edward III. is also explained at great length; and Lord Hale, alluding to the clause of the statute, speaks of it as "this *obscure clause* of *levying war* against the King." Accordingly, this obscurity produced a controversy, which is the subject of the passages so anxiously quoted by the prosecutor from Sir Michael Foster. The difference was just this. Lord Hale says, that "to make a treason within the clause of this statute, there must be three things concurring; 1. It must be "*a levying of war*; 2. It must be a levying of war *against* "*the King*; 3. It must be a levying of war against the King "*in his realm.*" On the first of these points, he says, that it is a question of fact requiring many circumstances which it is difficult to enumerate or define, "and commonly is expressed by the words, *more guerrino arraiati.* As, where people "are assembled in great numbers, armed with weapons offensive, or weapons of war, if they march thus armed in a "body; if they have chosen commanders or officers; if they "march *cum vexillis explicatis*, or with drums or trumpets, "and the like; whether the greatness of their numbers, "and their continuance together doing these acts, may not "amount to *more guerrino arraiati*, may be considerable." After stating that a *bare conspiracy* to levy war and provide weapons, &c. though it may in *some* cases be an *overt act of compassing the King's death*, is *not* treason under the head of the statute of *levying war* as a substantive treason; he adds, "Again, the actual assembling of many rioters in great numbers, to do unlawful acts, if it be not *modo guerrino*, or *in* "*specie belli*, as if they have *no military arms*, nor march "or continue together in the posture of war, may make a "great riot, yet *doth not always* amount to a *levying of war.* "—Vide Statute 3d and 4th Edward VI. cap. 5. 1 Mar. "c. 82." This last is the point on which Foster differs. He says, that the true criterion is, "*Quo animo* did the parties assemble?" That is, whether for a purpose of a private or particular nature, or for a purpose of general concern? And he says, "But every *insurrection which*, in judgment of "law, is intended against the person of the King, be it to dethrone or imprison him, or to oblige him to alter his measures of government, or to remove evil counsellors from "about him—these *risings* all amount to levying war within "the statute, whether attended with the pomp and circumstances of open war or not. And every *conspiracy* to levy "war for these purposes, *though* not treason within the clause

Hale, 148.
—— 130.
—— 131.
Foster, p. 210, 211.

" of levying war, is yet *an overt act* within the other clause, of " *compassing the King's death.*" And then he explains, what shall be deemed a levying of war in *this* sense, " *in construc-* " *tion of law,*" as distinguished from the direct levying of war against the King himself; and to mark the distinction between these, he adds, what is also a clear matter of law, (independent at least of the act of the 36th Geo. III.); " But Foster, p. 213. " a bare *conspiracy* for effecting a rising for *the purposes men-* " *tioned in the two preceding sections and in the next,* is *not* " an overt act of compassing the King's death. Nor will it " come under *any* species of treason within the 25th Ed- " ward III. *unless the rising be effected.* And, in that case, " the conspirators, as well as the actors, will all be equally guilty; for in high treason of all kinds, all the *participes* " *criminis* are principals." And, for all this doctrine, Foster refers particularly to the cases of Damaree and Purchase in the reign of Queen Anne.

Now, there is perhaps no very great difference, after all, between the doctrine of Hale and that of Foster. For, in the passage above quoted from Hale, he only says, that the assembling of rioters for unlawful acts, without the apparatus of war, " doth not *always* amount to a levying of war;" and though he does generally require the assembling *more belli* as a distinctive quality of the levying war, it is very doubtful, whether he would have differed at all from the judgment in the case of Damaree and Purchase. The object in that case was, the destruction of *all* meeting-houses of the dissenters; and though the persons assembled had not the regular accoutrements of an army, they were provided with implements proper for the purpose intended, such as " *axes, crows,* and *other* " *tools* of the like nature;" and Purchase was taken when actually assaulting the military with a *drawn sword.*

But it is unnecessary to pursue this inquiry. The informant cannot see, in what way it aids the plea of the prosecutor, to shew *this* difference between Hale and Foster, unless, indeed, his meaning be, to throw aside the authority of Hale altogether, on other points, in which he is not contradicted, but confirmed, by Foster.

If the prosecutor could have shewn, that, in the cases of Damaree and Purchase, it had been held *not to be necessary to set forth that* WAR WAS LEVIED *against the King,* but only to state the *overt act* of assembling to pull down all meeting-houses, the informant could understand the object of these quotations from Foster. But Foster himself states, that in Ibid. p. 213. those cases, " The indictments charged, that the prisoners, " withdrawing their allegiance, &c. and conspiring and in-

" tending to disturb the public peace and tranquillity of the " kingdom, did traitorously compass, imagine, and intend, to " *levy and raise war*, rebellion, and insurrection, against the " Queen, within the kingdom; and that, in order to complete " and effect these their traitorous intentions and imaginations, " they, on the day of at with a " multitude of people, to the number of 500, *armed and array-* " *ed in a warlike manner*, &c. then and there traitorously as- " sembled, *did traitorously ordain, prepare*, AND LEVY WAR " *against the Queen*, against the duty of their allegiance," &c. The difference of opinion, therefore, such as it is, does not at all affect the *distinct separation of all the treasons*, as laid down by the statute, and by Lord Hale. Foster does not make any thing to be treason in law, which Hale did not hold to be so; and the indictments in the cases of Damaree and Purchase were laid on the express allegation that *war had been actually levied*. The whole difference is, on the nature of the *overt act* which shall be sufficient to prove a levying of war: But, unless it be averred that war was levied, by whatever acts it is to be proved, it is clear, on every authority, that there is no allegation of *a treason* committed.

Another illustration of the difference between a treason itself, and the overt act by which it is proved, occurs in a point incidentally stated in the quotations above given. Before the act of the 36th of the King, a mere *conspiracy* to levy war was *in no case treason*. This is stated expressly both by Hale and by Foster. Yet a conspiracy to levy war *directly against the King*, is held by them both to be an *overt act* of compassing the King's death; while both also agree, that, in the case of the *constructive* or *interpretative* levying of war, which is not so much against the King's person as against his government, a bare *conspiracy* to levy war of that kind is *not* even an overt act of compassing the King's death. Your Lordships see, therefore, that in the one case, a conspiracy to do *that which, if done, would be in itself treason*, is declared *not* to be treason, and yet to be an *overt act* of compassing the King's death, which *is* treason; and in the other case, the mere *conspiracy* to do that which would be treason, *as levying war* against the government, and so *constructively* against the King, is neither treason itself, nor even an overt act of compassing the King's death.

Keeping these points in view, the informant must now come a little closer to the precise point of difference between him and the prosecutor in this case. The prosecutor maintains, that he is not bound to set forth in the indictment the specific treason, which he means to allege the oath administered bound

the party to commit. For if he is bound to set forth the specific treason, it will be an easy matter to shew, that he has not done so. He is obliged to admit, that if this were an indictment for treason, it would be bad, if it did not expressly allege what particular treason, under the statutes, the prisoner was charged with. At least, the informant presumes, that this must be admitted; because, if it is not, the contrary position would just be a revival of all the constructive treasons, and all the uncertainty which existed before the statute of Edward III. It must be admitted, that the mere statement of an act, which might be an *overt act* of *some* known treason, would not be sufficient allegation of the crime of treason, unless the specific treason were in the first place stated; that is, *either* compassing the King's death, *or* levying war, *or* adhering to the King's enemies, &c. But the prosecutor says, that this is not an indictment for treason, but an indictment for administering a certain oath; and that he is not bound to state any thing more than the actual purport of that oath, and is entitled to infer thereupon, that it is an oath binding the party *to commit treason generally*.

This plea seems to be answered, the moment it is reduced to the common sense of the thing. The prosecutor could not indict a man for *any* treason, without specifying *the* treason. He could not indict a man for *any* felony, without specifying *the* felony. The legislature has provided, that the fact of administering an oath, purporting to bind the party to commit *any* treason, or *any* felony, shall be felony. Now, what is it that the essence of this statutory offence consists in? It is *not* in the mere administration of an oath, nor in secret meetings, nor in an obligation of secrecy, &c. It consists *solely* in the *engagement* undertaken by the oath, to commit *a treason* or *a felony*. And what, then, is *a* treason or *a* felony in law? The general terms *treason* and *felony* indicate no legal idea, except by reference to the numerous specific treasons and felonies, which are established in the law. The crime here charged, therefore, lies in the engagement to commit *one* or *other* of those *specific* and known felonies or treasons. To say, that it was an engagement to commit treason or felony, without specification, is to make an affirmation which has no meaning in law. If the prosecutor could not have charged the *act* in the same manner, if it *had been committed*, it is, with submission, impossible to make sense of the plea, that he is entitled here to charge the imposition of the *engagement* to do it as the crime of this statute. The crime is in the imposition of an engagement to commit *a* treason. But the prosecutor could not have charged a treason as actually commit-

ted, by stating the very same things as *done*, which he here says the party was *bound to do*: And, therefore, it follows, with submission, as clearly as any conclusion in Euclid, that this is not a legal charge, that an oath was administered, *binding the party to commit* A *treason*.

The prosecutor says more than once, that he cannot state or prove the manner and circumstances of an act which never was committed. But this is an entire misapprehension of the point; the informant is not requiring him to state the manner and circumstances of any act. What he requires is this: The prosecutor avers, and must aver, that the informant administered an oath, purporting or intending to bind the party taking it to commit a treason. The informant requires him to state, *what specific* treason the oath did purport to bind the party to commit? If he has a case at all, he *must know* what treason he means to say *to the jury* the oath bound the party to commit. If he cannot state, that it bound to the commission of *a specific* treason, he has no right to try the informant upon this statute; and if he does know his own meaning, he is bound to state it for the information of the pannel, and of the Court; and, at any rate, without it there is no allegation of an oath to commit treason at all.

But, in truth, the prosecutor is ready enough to state what he calls the *act*, though only in contemplation. He has in all his indictments stated it nearly in the same way; and here he states it, by describing the oath to be an oath "purporting, or intending to bind the persons taking the "same, to commit treason, *by obtaining annual parliaments* "*and universal suffrage, by physical strength or force*, and "*thereby effecting* THE SUBVERSION OF THE ESTABLISHED "GOVERNMENT, *laws, and constitution of this kingdom*, "*by unlawful and violent means*." This is indeed an averment of *an act* said to have been in contemplation in the administration of the oath. It is an averment of an act *intended*, which, if *done*, might have been an *overt act* of *some* treason. But it is not an averment of *that as intended*, which *if done*, would have been *itself a treason*. On the contrary, it is precisely such an averment as all the authorities have reprobated as a charge of treason, and for the statement of which, as treason, the judges of Richard the Second suffered so severely.

It has been shewn, that the same fact may be an overt act of many different felonies. But the same is true of treason. The same act may be an act of compassing the King's death, of conspiring to levy war, of adhering to the King's enemies, or an act of treason under the non-intercourse acts during the

late war; and an oath binding to commit such an act must be precisely in the same predicament, and must be characterised in the very same manner that is necessary in regard to the act itself. Suppose a person administers an oath to another, binding him to deliver certain goods or money to a person in France. Allowing the prosecutor for the present to take his own views as to the meaning of the statute, when it speaks of the *purport* or *intendment* of the oath, it is obvious, that, supposing a treasonable intention, the act may be an *overt act* of *many* treasons. 1. The object may be, to bribe a person to come to England to murder the King. 2. It may be to raise troops, or purchase arms, in furtherance of a *conspiracy to levy war*. 3. It may be to give *aid to the King's enemies*; or, 4. It may be treason under the non-intercourse acts, by binding to the exportation of *goods not japanned*.

But can it possibly be maintained, that the prosecutor, in such a case, would be entitled to lay simply *the fact*, that an oath was administered, binding the party to commit treason, by delivering the goods in the manner engaged for, without specifying the particular treason which he alleged to be thereby engaged for? Undoubtedly the prosecutor here maintains that he would. The pannel so accused might come prepared to shew, that there was *no compassing the King's death*; that there was *no conspiracy to levy war*; and that there was *no adherence to the King's enemies*; and he might be catched in a capital felony, because the prosecutor *proved the goods not to be japanned*, and adduced circumstances to infer that the exportation of such goods was the object of the oath; although, if the prisoner had known *what the treason intended was*, he could perhaps have proved, either that the goods *were* japanned, or that he had reasonable ground to *believe* them to be japanned.

If it is clear, therefore, that, in alleging treason directly, it is quite insufficient to allege an act which may be an overt act to prove a treason; it seems to be at least equally clear, that, in an indictment for administering an oath alleged to bind to the commission of a treason, it cannot be enough, to state the engagement to do an act, which, if done, would be an overt act of some treason. In both cases, the special treason intended must be set forth.

The prosecutor seems to suppose, that the circumstance of the present question relating to an engagement, or an intention, one step removed from the actual case of treason, is to have the effect of doing away all the rules of the law of treason, and admitting all the looseness of construction which has been so often and so much condemned. But the informant

shall put a case, where the very same thing must have existed, and yet where the attempt to state the overt act in place of the specific treason, could not be maintained for a moment. Suppose that, before the act of the 36th of the King, there had been an indictment grounded on the *fact* of *conspiracy* to levy war to depose the King. As already explained, evidence of such a conspiracy would have been evidence of an *overt act* of *compassing the King's death*, although the bare conspiracy, not carried into actual effect, would not have been treason itself. Now, if the indictment had laid merely the *fact*, would it have been any answer to the objection of irrelevancy founded on the omission to lay *compassing the King's death*, to say, that the overt act had been laid, and that it belonged to the jury to infer the specific treason? The answer would have been, that it was *not* an allegation of *any* treason. Certainly, it could not have been listened to for a moment.

But there is another case, actually decided, and of a far stronger import than the present argument requires, which seems to the informant to be quite decisive of this whole matter. He refers to the case of Rex *versus* Kendal and Roe, decided by Lord Chief Justice Holt in the reign of King William. Kendal and Roe were committed prisoners to Newgate, by a warrant of the secretary of state, which authorised the keeper to receive them, "they being charged *with high* "*treason*, in being *privy to and assisting the escape of Sir* "*James Montgomery*, out of the custody of William Sutton, "one of his Majesty's messengers in ordinary, *and charged* "*with high treason*. You are to keep them in safe and close "custody, until they shall be delivered by due course of law." A writ of Habeas Corpus having been obtained, by which the prisoners demanded to be admitted to bail, a question arose, whether this was a good commitment for treason; and different exceptions were taken to the warrant. The only one that is material is thus stated by Lord Raymond: "*Lastly*, "The defendant's counsel took exception to the return, that "*the treason for which Sir James Montgomery was committed*, "*was not specified in the warrant of commitment*. For per- "haps Sir James Montgomery's treason might be such as "that the accessory to it should not be guilty of high treason. "And if a man receive a counterfeiter of the great seal, know- "ing that he is a counterfeiter, &c. it is not treason, 12. Co. "81. Receiving of a coiner, knowing that he is such, is but "misprision of treason. But Holt, Chief Justice, said, that "there was no authority, that a man who breaks prison, and "lets out a coiner, is not a traitor. *But he and all the Court* "*were of opinion, that supposing the crime to be high treason,*

Rex v. Kendal & Roe. 7 William III. Raymond's Reports, vol. i. p. 65, 66, 67. Salkeld, vol. i. 346. State Trials, fol. 554 to 562.

"*two things should have been specified in the warrant of com-*
"*mitment.* 1. *For what treason Sir James Montgomery was*
"*committed*; for he who breaks the prison is guilty *of* THE
"SPECIFIC *treason.* 2. It ought to have been averred, that
"Sir James Montgomery committed the fact; because the
"breaking of the prison is affected with the same offence.
"And therefore, for this defect, the prisoners were bailed."
Salkeld states the point shortly thus: Holt, Chief Justice, held, "*3dly, That Sir James Montgomery's treason ought to*
"*have been inserted in the warrant*, with an allegation that Sir
"James did the fact; because the defendants, by breaking
"the prison, are *guilty of the* SAME SPECIFIC *treason* and of-
"fence; *and for this cause they were bailed.*" In the State Trials, the case is reported at length; and Lord Chief Justice Holt states this point in the following manner: "But Mr. At-
"torney, the question is, *whether you ought not to have specifi-*
"*ed these two things in your warrants, for* WHAT *treason Sir*
"*James was committed?* And my reason is, because *the es-*
"*cape would be the same* SPECIES *of treason with that for*
"*which the party rescued was committed*; and, *2dly*, That he
"had done *a* treason, that Sir James was guilty. But Mr.
"Attorney, will you further consider of it, though I think we
"must bail them in the mean time, an *Habeas Corpus* being
"a *festinum remedium*; but I would hear my brothers' opin-
"ions." The other judges, Rokeby and Eyre, concurred in this point, and *the parties were bailed.*

The informant cannot help adverting to one of the arguments of the Attorney and Solicitor-General of that day, which his Maj[illegible]y's Advocate seems to have borrowed in the present case. "Then Mr. Attorney-General and Mr. Soli-
"citor insisted, that the rescue of one in custody on suspicion
"of treason was treason, *that the setting forth the overt act was*
"*more for the advantage of the prisoner than barely alleging*
"*the species of treason*," &c. His Majesty's Advocate seems to have adopted the same opinion, against all the law of treason. But Lord Chief Justice Holt held a very different doctrine, and decided accordingly.

It is evident, that the case of a warrant of commitment is a far stronger case than that of an indictment. Even if it could have been held, that the warrant of commitment for aiding the escape would be good, without specifying the particular treason; it would be quite impossible to state, that an *indictment* for *that* as treason would be good, without specifying *the* treason for which the party who escaped had stood committed. But that is just a case of the same nature with the present. The treason there lay *immediately* in the act of aiding the es-

cape, just as the felony lies here *immediately* in the act of administering the oath. But in the one case, the essence of the crime lay in *the treason* committed by Sir James Montgomery, and in the other, it lies in *the treason* which the oath bound the party to commit. In neither is it possible to state *any* crime as committed, without alleging the *specific* treason *done* in the one case, and *undertaken* to be done in the other.

If your Lordships will now look back to the statements of Mr. Hume in the passage formerly quoted, concerning the necessity of precision, accuracy, and a reasonable degree of minuteness, in the statement of the nature of the charge, and of the thing meant to be established against the prisoner, the informant presumes you will see the application which he intends to make of all the detail with which he has here troubled you. In some matters of mere technical expression, the rules of the law of England may be more strict even in indictments, than the rules of the law of Scotland. But in every consideration material in the present question, nothing can be more certain than that the very principle of a Scotch indictment necessarily requires more precision, more accuracy, and more minuteness, than ever was required in any English indictment. And yet the learned prosecutor will perhaps tell us in this case, that it is one of the "unseemly niceties" to which he is so fond of alluding, that a man should desire to know what the crime is of which he is accused, or that your Lordships should desire to see, that there is a crime *in averment merely*, before you allow an indictment to pass to the knowledge of an assize. The informant takes the liberty of saying, without the fear of reasonable contradiction, that, without the averment of a specific treason, as undertaken by the purport and intendment of the oath, there is no statement of any crime whatever. There it no statement of "the criminal "deed," such as "*may distinguish this particular charge from* "*all other instances of the same sort of crime.*" This is giving the prosecutor credit, for really intending to state a treason of some sort. But truly there is no averment of a crime at all; the statement being merely, that a man administered an oath, purporting to bind to certain acts, which are *totally unknown in the law of treason* as descriptive of *any treason*; and, on the contrary, absolutely decided by repeated judgments, both of the Courts and of Parliament, not to be any known species of treason.

Unless, then, your Lordships are to reject the principle of the law of Scotland, that the prosecutor must put it in the power of your Lordships to see whether he has a relevant case before you will require the pannel to go upon his trial;

and unless it can be held, that the prosecutor is entitled to withhold from the pannel a knowledge even of the crime—the particular felony, or the particular treason—in which the whole merits of the charge against him consists; it seems to be very clear, that, without going any farther, there is not even the appearance of relevancy in the present indictment.

II. The second point which the informant proposes to consider will not require a long discussion. It is, that this indictment does not in fact contain any statement of the particular treason, which the prosecutor alleges the oath to purport or intend to bind the party taking it to commit.

And yet the informant must be allowed to observe, that even here, though the prosecutor does not pretend to maintain that the indictment does state the particular treason, he still labours under a very important mistake as to the real state of the question. He says, that he is not bound to make any statement whatever, except a mere recital of the fact, or a simple allegation of the purport of the oath.—An hypothesis more inconsistent with the practical rules of the law of Scotland, cannot be conceived. But supposing it were so, your Lordships will be pleased to observe, that the prosecutor has not in this instance followed that course. He *has* made his *averment* quite distinctly, of that which he is pleased to state to be *the treason*, which the oath administered bound the party to commit. And, with submission, nothing can be clearer in the criminal law, than that, even when a party is *not bound* to make an averment on a particular point, if he *does* make it in a manner that is relevant, the whole indictment falls to pieces, on account of this irrelevancy. In the present case, the whole relevancy on the substance of the oath depends on the question, whether it did purport to bind the party to commit treason? The prosecutor says, he was not bound to make any averment whatever on this subject, and might have simply stated, that such an oath was administered, narrating the purport. The informant shall consider this. But, in the first place, the prosecutor has, in the indictment, stated what he holds to be the purport and intendment of the oath. And truly, if your Lordships were rid of every other question, you would be under the necessity of deciding, whether that statement contains a relevant allegation of *any treason*.

Now, what is the allegation? It is, that the oath bound to commit treason, "by obtaining annual parliaments, and uni-"versal suffrage, by physical strength or force, *and thereby ef-"fecting the* SUBVERSION OF THE ESTABLISHED GOVERN-"MENT, LAWS, *and constitution of this kingdom*, by unlawful "and violent means." There is no denying, that this is

meant to be a statement of an oath binding the party to commit treason. But unless the law of treason, instead of being the most certain of all laws, is reduced again into the uncertainty of the treasons of Richard the Second's time, it is impossible to maintain, that this is an allegation in point of law of any obligation to commit a treason.

The informant shall not here repeat what he has already fully detailed, concerning the result of the attempt, in the time of Richard the Second, to defeat the act of Edward the Third. But the words of Lord Hale are certainly very striking, and apparently prophetic, where he says, that those proceedings shew "how dangerous it is to depart from the letter "of that statute, and to multiply and enhance crimes into "treason, by *ambiguous* and *general* words, as *accroaching of* "*royal power*, SUBVERTING OF FUNDAMENTAL LAWS, *and the* "*like*." The case of *subverting fundamental laws*, represented as a treason by Richard's judges, is the very case which the prosecutor has here adopted, and obstinately persevered in maintaining, in three indictments. But if this was not an allegation of treason in Lord Hale's time, and was still less admitted by Foster, the prosecutor will find it difficult to produce even the vestige of an authority, for so violent a revulsion to the tenets of one of the most arbitrary reigns that can be selected in the earlier history of England.

It is remarkable, however, that even the discussions and the statutes produced by these attempts in the time of Richard the Second, to disturb the statute of Edward, are not without the support of express authority in a later period. The act of reversion of the attainder of the Earl of Strafford, is a decisive confirmation of it. In those violent times, the very same thing was successfully practised. The bill of attainder bears, that the commons of England "impeached "Thomas Earl of Strafford, of high treason, *for endeavour-* "*ing* TO SUBVERT THE ANCIENT AND FUNDAMENTAL LAWS "*and government of his Majesty's realms of England and Ire-* "*land*, and to introduce an arbitrary and tyrannical govern- "ment, against law, in the said kingdoms; *and for exercising* "*a tyrannous and exorbitant power over and against the laws of* "*the said kingdoms, and the liberties, estates, and lives of his* "*Majesty's subjects*." There were other charges; but this was the leading one; and on that bill, Lord Strafford was attainted and executed, as all the world knows. Now the act *reversing* this attainder begins in the following terms: —— 1770. "Whereas Thomas late Earl of Strafford, was impeached of "high treason, *upon pretence of* ENDEAVOURING TO SUBVERT "THE FUNDAMENTAL LAWS, and called to a public and so-

Trial of Earl Strafford, p. 756. See also State Trials, 1641.

" lemn arraignment and trial before the peers in Parliament, " where he made a particular defence to every article object- " ed against him; insomuch that the turbulent party, then " seeing no hopes to effect their unjust designs by any ordi- " nary way and method of proceedings, did at last resolve to " effect the destruction and attainder of the said Earl, by an " act of Parliament to be therefore *purposely made, to condemn* " *him* UPON ACCUMULATIVE TREASON, NONE *of the pretended* " *crimes being* TREASON APART, *and so could not be in the* " *whole, if they had been proved,* as they were not; and also " *adjudged him guilty of constructive treason,* (that is, of levy- " ing war against the king)," &c. On these and other reasons, the statute bears, " for all which causes, be it declared and " enacted, &c. that the said act of attainder is now hereby " repealed, revoked, and reversed."

Nothing can be more precisely descriptive of the prosecutor's notion of a treason, than the very words, both of the bill of attainder, and of the act of reversal, in that very celebrated case. And whatever other merits might be involved in Lord Strafford's conduct, the informant believes, that no lawyer in better times ever doubted that in this point the reversal declared the law correctly. It is in precise conformity to the very words afterwards employed by Lord Hale, as well as to those of the statutes which condemned the judgment of Tresilian and the other unfortunate judges, who were weak enough to surrender the liberties of their country to the influence of the prejudices, or of the interests of the moment.

His Majesty's advocate has had the merit of asserting in the present day, that a man had engaged *to commit treason,* who, according to his Lordship's own averment, was under an engagement simply to do the very thing, expressed by *the same words,* which Tresilian and the other judges lost their lives or liberties by declaring to be treason, and which the Parliament of England long after declared *not to be treason,* by reversing the attainder of the Earl of Strafford. And, with the full leave of the informant, he may take the farther merit of maintaining that to be an averment of treason, which Lord Hale has bestowed many anxious pages to prove to be merely one of those pretences of treason, by which, in bad times, the best principles of the constitution had been endangered, and the real interests of the country betrayed.

It seems, then, to be past all possibility of dispute, 1. That the prosecutor has not stated what the treason is, which the oath libelled on purported to bind the party taking it to commit; 2. That he has in fact stated that to be treason which is not treason; and the allegation of which, as treason, has been

invariably condemned in all the best times of the law. And the informant believes that he has proved, 3. That an indictment under this statute, which does not state the specific treason referred to, cannot be relevant or competent to be sent to a jury.

III. The third part of this cause remains. Your Lordships have to consider, whether the oath, the purport, if not the terms, of which, is set forth in the indictment, is an oath purporting or intending to bind the party taking it to commit any treason in terms of the statute.

But, before entering on the consideration of the words set forth in this libel, it is impossible not to take notice of the irresistible inference concerning the prosecutor's own knowledge of the fact, arising from the whole circumstances already detailed. It is here maintained, that the prosecutor is not bound to set forth the words of the oath at all, but only the purport which he ascribes to it.—Of this presently. But the prosecutor has set forth, in all the indictments, specific words, which he states as the purport of the oath said to have been administered; and which words, of course, he is bound to know to be as nearly as possible the words of which he means to attempt a proof. But, before looking into the nature of the oath so expressly libelled on, it is quite impossible to overlook the circumstances under which your Lordships are desired to consider the effect of it.

In the information of his Majesty's advocate, there is an appearance of taking this case to be attended with no difficulty. But, considering that this is the third indictment which has been raised, and that on it your Lordships have required informations, the informant is at least entitled to say, that, in the way the indictments of the prosecutor have been managed, they are involved in the most serious difficulties in point of relevancy. In saying this, the informant imputes no blame to the prosecutor, except that of an insufficient consideration of the case, before raising the first indictment, and too much perseverance in an untenable case; for he can draw no other inference from the whole course of these proceedings, but that really the prosecutor is *not able* to state, *in point of fact*, a case that would be *relevant* under this statute. If he could have done so, it is, with submission, quite inconceiveable that, after all the discussion that has taken place, he should have exhibited this last indictment, exposed to every one of the objections, in point of substance, which lay against the two former libels. It is impossible to infer any thing from this perseverance in a wrong course, except this, that the prosecutor knows, that if he were once to lay the indictment as it ought

to be, it would either be apparent that it was irrelevant, on account of a plain incongruity between the averment and the purport of the oath set forth; or, if the relevancy of it should be made out by strong averment, it would totally fail upon the *evidence*. Notwithstanding the very extraordinary charge on the words of the oath in this indictment, the informant gives the prosecutor credit for rejecting this last course. He does not believe, that the prosecutor would attempt to obtain an interlocutor of relevancy, by framing his indictment in a manner which he knew to be exposed to a necessary failure upon the evidence. And he must confess, that he attributes the whole failure in these indictments to this cause. The reality is, that the attempt to try the prisoners upon this statute has been begun without a due consideration of the nature of the case, and of the crime which the statute has created; and the prosecutor now finds, that he cannot, consistently with the facts of the case, libel the indictment in *the only way* in which a relevant indictment can be laid under this act of Parliament.

The informant cannot otherwise, after all the discussion which has taken place, account for the form of the present indictment. In the discussion on the second indictment, it was very distinctly stated, by the counsel for the crown, that the treason which he meant to allege, as involved in the oath, was that of *levying war*. Now, *what difficulty could there be in stating this in the indictment in plain words?* The minor proposition would just have run thus: "In so far as you did "wickedly and feloniously administer, or cause to be admi- "nistered, an oath, purporting or intending to bind the party "taking the same, to commit a treason *by levying war against* "*the King*; which oath was in the following terms, or of the "following purport." Supposing the purport of the oath set forth *to support this statement*, the informant sees at present no objection to the relevancy of it, as an averment to satisfy the terms of the statute; except, indeed, the objection of the felony merging in the treason. And why is it that the prosecutor will not make that averment? Considering the difficulties which your Lordships have felt on this subject, it is quite impossible to imagine, that the prosecutor would avoid so very obvious a method of removing the first difficulty, after it had been twice clearly pointed out, if he had not solid reasons, in the substance of the case, for refusing to make the averment. The informant confesses he cannot account for the proceeding on any other hypothesis.

But if the pursuer cannot make the averment *in terminis* in the indictment, which he has already expressed in debate, can any other inference be drawn, but that the indictment must be

irrelevant? He says, he means *to prove to the jury*, that the oath purported to bind the party *to levy war*. Then, why not so in the indictment? No reason on earth can be given, but one of three: Either, *1st*, The prosecutor has taken up a notion of his own about this indictment, against all law and authority, and he will not depart from it; or, *2dly*, He knows that if he made the averment of levying war, the purport of the oath, which he must set forth, would shew a plain irrelevancy; or, *3dly*, If he got the indictment passed to an assize, the fact would not support the averment, and the jury could not fail to see it with perfect clearness. The informant considers the first supposition to be out of the question, and he by no means imagines it. But the two other explanations of the proceeding, he cannot but think to be the real truth of the case; because, considering the clear authority that is against the prosecutor in his present form of libelling, it is inconceivable, why he should not have removed the objection by so very simple a course of proceeding.

If the prosecutor thought, that by possibility the facts of the case might resolve into some other treason than that of an engagement to *levy war*, the informant is not aware that he would be tied down to this. If the indictment were in England, he might lay it under *separate counts*, as an engagement *to levy war*; an engagement to *compass the King's death*; or an engagement to *conspire to levy war*, &c.; and the informant is not at present advised of any objection that could be made to an indictment in this Court, which laid the case *alternatively* as an oath binding to compass the King's death; *or otherwise* an oath binding to levy war; *or otherwise* an oath binding to conspire to levy war, &c. In other cases, as many alternatives may be taken. In a case of *rape*, it may be laid alternatively, *rape*; or *assault with intent to commit rape*; or *simple assault*; or *wounding* under Lord Ellenborough's act. And other illustrations might be given.

Why the prosecutor has not adopted some such course as this, is quite inconceivable, on any other supposition than that he knows the case could not be sustained if he were so to state it. And thus your Lordships enter on the consideration of the purport and intendment of the oath, with real evidence before you, that the prosecutor dare not state, that the oath does purport or intend to bind to the commission of any specific treason. When your Lordships look unto the oath set forth, and weigh the terms of it, you cannot be much surprised at the existence of this impression.

It is impossible to say a word concerning the construction to be put on the oath, as stated in the indictment, without

first taking some notice of the very extravagant doctrines which are maintained in the information for his Majesty's advocate.

It is first maintained, that the prosecutor is not bound to set forth the words of the oath at all, but only the purport; and that any oath, *however innocent*, if it were proved to be *intended* to signify an engagement to commit treason, might be a relevant ground of charge. The informant humbly denies this to be at all the meaning of this statute. He apprehends that the words "purporting or intending," were purposely employed, instead of those of the former statute, "purporting or intended," in order to exclude this construction. But, supposing it were otherwise, it would not avail the prosecutor. For even if it were admissible to set forth the oath of allegiance, or any other oath, however innocent in its purport or intendment, and then to prove that the actual intention was different from what appeared on the face of the oath, it is apprehended that nothing in the world could be clearer, than that, according to all the practice of your Lordships, the prosecutor must set forth specifically the facts, from which he meant to draw the inference of an intention different from, or stronger than, the purport and intendment of the oath libelled. In that case, the indictment would be bad for want of specification.

But, more generally, the informant must observe, that he knows of no principle, on which the prosecutor can be exempted from setting forth the oath alleged to have been administered. It is true, that, by the fourth section of the statute, it is provided, that he shall not be bound to state the very words of the oath, but only the purport of it. But he is still *bound to libel the purport*; and if the purport so libelled does not support the allegation of an oath, *purporting or intending to bind to the commission of a treason*, the informant can discover no authority in this statute, for alleging, on any other ground, that a felony has been committed.

There are many analogous cases which may be suggested. The informant understands, that, in the law of England, it is quite settled, that in an indictment for *sending a threatening letter*, the terms of the letter must be set forth; and that, in like manner, in an indictment for obtaining money on false pretences, the false pretence must be stated. So also, in an indictment on the statute 39th Geo. III. c. 106, against agreements among workmen *for controuling* their masters, the words of the agreement alleged must be libelled on. But the informant cannot desire any case more analogous than one which is distinctly laid down in our own law, that of an

indictment for *perjury*, where, as the question turns precisely on the terms of an oath, the rule has a direct application to the present case. And the informant shall return to that case, as soon as he has adverted to another very extraordinary doctrine of the prosecutor.

It is maintained in this case, it is believed for the very first time in a criminal court, that there is no presumption in favour of innocence, or at least none which can weigh with your Lordships in this question of relevancy. When the prosecutor says merely, that, in a question of relevancy, the first act of the mind of a judge is to assume the truth of all the facts charged, the informant understands what he means; and though the statement has no tendency to prove the relevancy of an indictment, in which there is no allegation even that any specific crime was committed, and far less any specification of facts to support it, the informant has no occasion to dispute the general proposition. But the prosecutor has gone a great deal farther. The question concerning the purport or intendment of this oath, is a question of construction and relevancy by itself; and whether it belongs to the judge or to the jury to consider it, there must be some rule of judgment to turn the scale, on the supposition that any doubt hangs over it. The informant's counsel took the liberty of suggesting the very obvious and common-place rule of law, that in all trials for crimes, there is a presumption in favour of innocence, which runs through the whole proceedings, and is applied to the indictment—to the proof—to the verdict; and he remarked the peculiar importance of giving full effect to it, in a case where the whole charge turns on the import of words, which may admit of various meanings, and may be understood by different persons in very different senses. It seemed to him, that the principle of judgment in such a case must necessarily be, that, if the words alleged are *at all susceptible of a meaning consistent with innocence*, the accused, who stands on the peril of life and death, must have the benefit of that construction; and that it could not be a good allegation of administering an oath, purporting to bind to commit a treason, where the oath averred is of a purport which *may either* be reconciled with the supposition of perfect innocence, or at least with some bad or even criminal purpose of a much lower denomination. He did not mean that, by far-fetched and extravagant conceptions, some colour of possibility could be raised. He only maintained, that, if upon fair and just construction, the oath set forth did not *necessarily* purport an obligation to commit a treason, he was entitled, by the established presumption of law, to take the more favourable or less criminal construction, and to ob-

ject to the allegation, as not a relevant statement of an oath purporting to bind to the commission of any treason.

All this appeared to be so very trite and clear, that an apology was even thought necessary for insisting on it. But the prosecutor has here a case of that unmanageable nature, that he is obliged to reject even the most established maxims of law, and to invert the plainest rules of justice. In his information, he has told your Lordships explicitly, that "it is sub- Inf. p. 8.
"mitted, that if the words of the oath are *at all susceptible of* "*the meaning put upon them by the prosecutor*, and *may* bear "that meaning, your Lordships are *bound to give him credit* "*for the truth of that* CONSTRUCTION *which he puts upon them.* "It is quite a mistake to say, that he must shew, in this ques- "tion of relevancy, that the words *must of necessity* bear the "criminal meaning. If, indeed, the criminal meaning be "*plainly a forced construction*, and one which they cannot rea- "sonably bear, your Lordships might hesitate as to sending "them to a jury, unless it were alleged that they have a hid- "den or different meaning from what they express. But if "the meaning be neither forced nor unnatural, or *if it be at* "*all a reasonable*, OR EVEN A POSSIBLE *construction, the pro-* "*secutor is entitled to the verdict of a jury on the charge*, and "to demand the assumption of the truth of *every allegation* he "makes in the preliminary stage of the process." If your Lordships are prepared to admit this statement of law, it will be in vain to object to the relevancy of any indictment. But the informant must remind the prosecutor, that the *allegation* of a *construction* is not the allegation of a *fact;* and, what is still more remarkable, that the prosecutor has not, *in fact*, made any proper allegation in this indictment, of the construction which he puts on the oath; and is actually maintaining, that he is not bound to do so. But is it really true, that, if the words set forth by a prosecutor, or his averment of facts, which is the same thing, are *at all susceptible* of a criminal meaning, or can, *by any possible construction*, be made to bear it, the indictment must be held relevant? This is an inversion of all the rules of criminal law. What *is* a question of relevancy? It is, whether the facts averred, if proved as stated, amount to, or *legally prove the crime charged.* But *do* they *prove* it, if it is merely that, by *any possible* construction, they *may* admit of the criminal meaning? Is not the rule just the contrary, that, supposing all the facts proved, if they do not *necessarily*, or according to fair *necessary* conclusion, prove or amount to the crime charged, there is no case made out, and the presumption of innocence prevails? The question of relevancy, before proof, is just the same to the Court, on the

assumption of the facts averred, as the question of *guilty or not* is to the jury, on the *actual state of the proof.* If a jury could not legally convict on an *admission* of all the *facts* averred, but not of the prosecutor's *constructions*, the Court cannot find the libel relevant. The question is just the same in both cases, and the presumptions in favour of innocence must have at least the same weight, in considering the prosecutor's *averments* before proof, which they confessedly have in the construction of his proof after it is led.

When the prosecutor was propounding this new principle of criminal justice, the case of a trial for *perjury* might have occurred to him; and he might have asked himself this question—Is an indictment for *perjury* good, though the thing *alleged* to have been sworn, is *perfectly reconcileable* with innocence, if, by *any possible construction*, it *may* bear the supposition of wilful falsehood? The informant shall answer the question in the words of Mr Hume. "The substance of the crime, "and that which all the other particulars in the description "of it only modify and limit is, that a plain falsehood be ex- "plicitly and wilfully affirmed. For, if *either there is* ANY "DOUBT *about the true state of the fact*, or *about* THE SENSE "IN WHICH THE PANNEL'S WORDS ARE TO BE UNDERSTOOD; "OR IF THEY CAN IN ANY REASONABLE WAY BE RECON- "CILED WITH THE TRUTH, OR WITH AN INNOCENT INTEN- "TION, *or, in general, if it is not manifest and obvious, but* "*matter of likelihood only, and of inference and comparison of* "*many particulars, that he had a false and corrupt meaning,* "*this shall save him from the accusation of perjury. Indeed* "*it would be very dangerous to convict any one upon such con-* "*structive grounds; considering the imperfection of language,* "*and the still more imperfect use which so many persons have* "*of it, and how unequal their degrees of intelligence in the af-* "*fairs of life, and even their degrees of capacity for the obser-* "*vation of facts.*" The learned author quotes cases in support of this statement, in which libels for perjury were found *irrelevant*, precisely because the oaths as averred did not "ab- "solutely exclude" the supposition of innocence. And he thus proceeds: "For the same reasons which suggested these "decisions, it is *more especially requisite*, that in all processes "for perjury, the prosecutor *be not allowed to lay his libel ge-* "*nerally*, or in ambiguous terms; *since otherwise he would* "*take the cognizance of the relevancy of the charge to himself,* "*out of the hands of the Court, to whom of right it belongs.* "He has to explain, therefore, wherein it is that the false- "hood lies, and must support (or as we say, *qualify*) his "charge with such a statement of the circumstances of the

Hume, vol. i. p. 127.

Ib. 129.

" fact, as justifies his averment of a false oath having been
" taken, and shall ground a clear inference (if they be prov-
" ed) concerning the situation of the pannel's conscience on
" the occasion. It was, accordingly, for want of such a de-
" tail and explanation, that one part of the libel was found
" irrelevant in the noted case of Lawson of Westertown."

The informant presumes he has said enough on this singular doctrine of the prosecutor, and that, whatever opinion your Lordships may form on the purport of this oath, in point of relevancy, he may at least rely on your Lordships giving to him, in this case of capital arraignment founded on words alone, all the benefit of those presumptions of law and reason, which protect innocence even against trial on loose and doubtful allegations.

In taking notice of the remarks made by the informant's counsel, on the terms of the oath, the prosecutor has been pleased to allude to the obligation of secrecy, and in connection with it to add, " An amiable feature of the whole trans- Inf. p. 6.
" action, and which affords a pleasant commentary *on the pa-*
" *negyric that was pronounced* at the first debate, on the ' bre-
" therhood of affection,' in which it was said to be so ' becom-
" ing, that all the subjects of this country should dwell to-
" gether in unity.' " It is impossible not to feel some surprise at this passage; for, undoubtedly, *no such sentiment was expressed by either of the informant's counsel.* An argument was indeed maintained to shew, that the proposal of establishing a brotherhood of affection, *did not of necessity imply any criminality*, or *that* criminality which is meant to be charged in the indictment. But *no panegyric was pronounced:* and in general, it was admitted, that the oath might be improper and dangerous, and might raise *suspicions* of criminal designs. It would, therefore, have been more correct, if the prosecutor had withheld an insinuation so perfectly groundless.

The prosecutor has libelled the purport of the oath, which he says was administered; and it is somewhat remarkable, that he should come to a trial of so serious a nature as this, in such uncertainty as to the words which were really used, that he can at pleasure substitute one word for another, as it suits his argument on the question of relevancy. But as he was bound to aver the purport and intendment of the oath, and has accordingly set forth the words which he says contain the purport of it, it is for your Lordships to judge, whether, if an oath in such terms was administered, it is an oath purporting or intending to bind the party taking it to commit a treason. This is a question quite distinct from the question already considered, as to the necessity of setting forth the spe-

cific treason. Supposing that the prosecutor had libelled an engagement *to commit treason by levying war*, or any other *specific* treason, and had then set forth this oath, the question is, whether it comes up to the averment, that it was an oath purporting or intending to bind to the commission of a treason?

But, in this part of the question, the prosecutor is under another mistake. Assuming that he is not obliged to state the specific treason, he farther takes it for granted, that your Lordships are not to be satisfied that the oath does purport or intend to bind to the commission of a specific treason. But, with submission, whatever opinion may be entertained on the other point, it is quite impossible, that your Lordships can hold that this indictment is relevant, unless you are satisfied, that the purport of the oath set forth is such, that you are now prepared to affirm that it *does purport or intend* to bind to the commission of some *specific* treason. Unless your Lordships can reject all the accumulated authority on the law of treason, and proceed on the old vulgar notions of treason in the abstract, consisting in any thing imaginable that is disagreeable to the existing government, it is impossible, that you can hold the purport of the oath libelled to be an obligation to commit treason, until you are satisfied *what* treason it does purport or intend to bind the party to commit. The informant says, that the prosecutor is *bound to state* what the treason is. But allowing him to get rid of this difficulty, it is at all events necessary, that your Lordships should see that *the oath averred* does purport to bind to some specific treason. Without this, there is no end to the looseness of such an indictment. For, if your Lordships cannot tell what the treason is, how is the pannel to discover it? How are your Lordships to judge of the relevancy? How are the jury to judge of the application of the evidence? The jury must give a verdict indeed; but the very thing which the law intends to prevent, by requiring an interlocutor of relevancy, before allowing the case to go to a jury, is the risk of erroneous inferences, or incorrect views of the law, and verdicts of conviction which are not warranted by any sound or logical charge.

Your Lordships will look, then, into this oath, keeping it in mind that you must make up your opinions, that it does purport or intend to bind to the commission of some specific treason. The prosecutor has said, that the treason is that of levying war; and yet it is very remarkable, that he has not now ventured to state this in his information. The truth seems to be, that the moment the case is reduced to the test of a defined treason, it is only by a most violent stretch of the

terms of the oath, and by the aid of presumptions and suppositions not supported by any facts libelled, that it can be maintained to be an oath purporting to bind to the commission of treason.

The prosecutor endeavours to distinguish the word *purporting* from the word *intending*, and represents the latter as having reference to the intentions of the parties, whatever may be the terms or apparent purport of the oath. The informant submits, that this construction is altogether inadmissible; and he understood your Lordships to have long ago intimated a clear opinion, that these words, "purporting or intending," do not refer to the intentions of the parties, but to the *purport* and *intendment* of the oath itself. The informant does not mean by this, that the prosecutor is tied down in his proof to the very words which he sets forth in the indictment, so that if he should prove words slightly differing from them, he would not be entitled to a verdict. Both these words may perhaps seem to exclude this supposition. The informant might admit, that neither the *purport* nor the *intendment* means the same thing with the *tenor* of an oath. But when this is admitted, which at once answers a great part of the prosecutor's reasoning, it is still true, that the purport and intendment being stated must shew *ex facie* a relevancy. The oath, as stated in point of purport and intendment, must be an oath which, in the judgment of your Lordships, does purport and intend to bind the party taking it to commit a specific treason. Still it does not depend on any latent intentions of the parties. It is the purport and intendment of *the oath* that must determine the relevancy of the indictment; and the opinion of your Lordships on that point is not to be altered by any supposition of concealed views in the parties.

The remarkable change of terms, between this statute and the former act against unlawful oaths, very strongly confirms this view, as being the real meaning of the legislature. In that former act, the words were, "purporting or intend*ed* to "bind," &c. The word "*intended*," as opposed to "purport-"ing," might be supposed to refer directly to the intention of the parties, and so to mean, that though the oath might not exactly purport an engagement to commit a treason, yet it was so understood and *intended* by the parties. The statute now before your Lordships is a much more severe statute, raising that into the rank of a capital felony, which, if the meaning were exactly the same, was before only a felony, with benefit of clergy. Here, it must be supposed, the legislature looked with greater care to the form of expression; and though they made it capital to administer an oath, *purport-*

ing to bind to the commission of a treason or felony, or an oath *intending* to bind to the commission of a treason or felony, they did not think it expedient to extend the punishment of death to an act of so very loose a character, as that of administering an oath, which, though not bearing, even in purport or intendment, any obligation to commit a treason or a felony, might, by *construction*, *inference*, or *implication*, be *represented* as so *meant* or *intended*. The difference between these two things is manifest; and yet the prosecutor has been pleased, without taking any notice of the argument, and in the face of what was understood to be expressed as the opinion of your Lordships, to assume at once, that if there is the slightest pretence for *suspecting* an *intention* in the parties to administer or take an oath to commit treason or felony, the crime of the statute is committed.

There is an important distinction which the prosecutor entirely overlooks. To administer an oath which is *intended* to bind the parties to commit treason, is undoubtedly a great crime; it is perhaps clearly within the former statute, but, at all events, it is punishable on other grounds. But, though a great crime, it may not be *the* crime of *this* statute. The informant has no doubt, that the prosecutor could have libelled the case which he alleges in his information, though not in the indictment, as a crime severely punishable in the law of Scotland. But the question on this indictment is, whether the oath as libelled is within the particular statute; and there the question is, whether it *purports* or *intends* to bind the party to commit *any treason*. And this is humbly apprehended to be an entirely different thing from any supposed intention in the parties to an oath which has no such purport or intendment.

One consideration may serve to shew the very great difference between the terms of the statute, and the prosecutor's construction of them. When your Lordships are considering the purport or intendment of an oath, writing, or speech, you are entitled to infer from the words, that *both* the parties understood and intended that which was expressed. But if your Lordships are required to look into the *intentions* of parties in the use of words which do *not purport* the intention assumed, it is evident, that the one party might intend a meaning, of which the other never thought for a moment. The administrator of the oath might have meant to impose an obligation to commit a treason, while the taker received it in its plainest meaning and purport, and never thought of the hidden design. In such a case, it could never be said, that the oath was an obligation purporting or intending to bind the party

to commit treason, when the party taking it was altogether insensible of any such meaning. In the same manner, the party taking it may understand an obligation to commit a treason; and yet this may be totally unknown to the *administrator*, from whom the secret intention may be entirely concealed, and who may, in plain good faith, administer a perfectly innocent oath, having no such purport, and no such intendment. This just shews the great and essential difference between the two things; and the informant humbly apprehends, that, considering the terms of this statute, he is entitled to the strict and true meaning of those terms, as fixing a rule totally different from that of the extraneous intentions of the parties.

But your Lordships will observe, that in reality the prosecutor in this case has not put himself in a situation to plead the point in the way he attempts to plead it. He has not stated in the indictment, that the oath was *intended* or *understood* to bind the parties *in any other way* than according to its *express purport or intendment*. There is no allegation of a concealed or different meaning, far less any specification of facts to support such an allegation. In truth, therefore, there is here no room for this discussion. For whatever it might be competent to a prosecutor to libel under this statute, surely there can be no doubt, that if he libels the purport of an oath, and makes no special averment of a different meaning, and no specification of facts to infer such a supposition, he must be held to confine himself to the purport set forth, as indicating the intention both of the administrator and the receiver of the oath. Here, accordingly, the prosecutor does confine himself to the purport stated. For as to his statement of secret meetings, and the numbers to whom the oath is said to have been administered, it is quite absurd to allege, that such circumstances are of the slightest relevancy, to give any effect to the oath, which its purport and intendment do not warrant.

The question then is, what this oath purports and intends by its terms to bind the party taking it to perform? In considering this, the prosecutor always assumes, that there is no other alternative but to suppose, that the oath either bound the party to commit treason, or was perfectly innocent. But this is a supposition altogether erroneous. It may be admitted, that, without reference to some other objects, this oath was in a high degree improper; that it was highly criminal; that it was of an extremely dangerous tendency; that it was the duty of the public prosecutor to take notice of it, if the facts were true; and that it might, with the utmost propriety, have been made the subject of an indictment. Supposing all

this, the question remains, whether it is an oath binding the party *to commit a treason?* Nothing, therefore, can be more irrelevant or inconclusive, than to state circumstances in the oath which indicate improper or criminal views. They may be very relevant to shew *such* intentions; but what your Lordships are bound to determine is, whether the oath purports to bind the party to commit treason. Supposing that the prosecutor libelled, as he does, that the pannel administered an oath purporting to bind to the commission of a *treason*, and that your Lordships were satisfied that it purported to bind to commission of a particular *felony*, the criminal intention would be clear enough, but the irrelevancy of the indictment would be equally clear. Or, supposing that it were libelled in the same way, and your Lordships were satisfied that the administration of the oath amounted to a *sedition*, or was meant to excite a *riot*, the criminality would be plain enough; but it would make nothing towards shewing that the indictment might be sent to an assize. It is most important to remember, that the law of treason is the most sacred and delicate of all subjects in the law, and that this is an indictment which *either* involves an engagement to commit *a treason*, and nothing else, *or* is *totally irrelevant*. The blame or criminality imputable to the parties in other respects is totally immaterial to the question.

Look, then, into the terms of this oath. The informant does not intend to detain your Lordships with any long or minute criticism. He does not agree with the prosecutor, that your Lordships can desire no assistance from any remarks on the oath; and he so far differs from him as to the obvious purport of it, that he thinks no person can read it, and say that its purport is to commit treason of any kind. He may suspect bad intentions; he may even suspect treasonable intentions. But this is not the point. It has been the prosecutor's object throughout to escape from all legal precision, and to take away the life of the informant on some rough and unmeaning conclusions of a criminality which he cannot define. But the question is, whether the oath purports the commission of a treason, and, according to the verbal statement of the prosecutor, it truly is, whether it purports *an obligation to levy war*.

The party swears, "that he will persevere in his endeavours "to form a brotherhood of affection among Britons of every de-"scription who are considered worthy of confidence." It was said, that this implied an association of prodigious extent. Perhaps not; for it is limited by the ideas of confidence which the parties entertained. But though it were ever so wide,

that would not make the obligation to form it an obligation to commit treason It does not even imply criminality by itself, though it may be rendered criminal by the objects in view. He next swears to "persevere in his endeavours to ob- "tain the elective franchise for all persons of the age of twenty- "one, not disqualified by crimes, &c. and annual parliaments." The prosecutor may state, and those who argue the case of the informant will agree with him, that nothing more unconstitutional, nothing more absurd, nothing more mischievous, nothing more necessarily leading to despotism, and to the destruction of the liberties of the country, could be suggested, than this proposal of universal suffrage and annual parliaments. But if there is any liberty in this country, it permits the subject to entertain, and even publish, speculative opinions, which are unconstitutional, absurd, and even mischievous, if they do not tend to any direct breach of law. If there is any thing certain in the law of treason, (and it is the most certain of all laws,) the pursuit of such objects has not the least relation to any treason, and does not even infer the slightest suspicion of an intention to commit it.

But the sting of this oath is supposed to lie in the words which follow, "and that I will support the same to the ut- "most of my power, either by moral or physical strength, (or "force), as the case may require." It is not clear to what the words, "support the same" refer. They may refer to the *brotherhood of affection*, or to the *endeavours* for obtaining annual parliaments and universal suffrage themselves when obtained. If there is any doubt, your Lordships will interpret favourably. And this is the more necessary, when you consider the nature of this offence. There might be very mischievous designs in the person or persons who originally framed this oath; and yet, if it was administered to hundreds, as the prosecutor says, probably nine-tenths of them did not understand it. At all events, they might put different constructions; and if the plain grammar of the sentence admits of applying the words "to support the same." to the objects when attained, the informant is entitled to the benefit of that construction; and in demanding it, he is not asking any force upon the words which they do not fairly bear, but only that reasonable allowance for the imperfection of language, and the various understandings of it, which all writers agree must be given in such a case.

But, allowing the prosecutor to apply these words to the *endeavours* for obtaining universal suffrage and annual parliaments, can any man say, that they *purport* an engagement *to levy war against the King?* The party is to support his en-

deavours *to the utmost of his power*, either by his *moral* or his *physical strength*, as the case may require.

If it had been that he was to support them *to the utmost of his power*, without any addition, would it have been an engagement to commit treason? Those words would have comprehended *all that is expressed* by the words as they stand: They would have comprehended both moral and physical *strength*, both moral and physical *force*. The informant supposes, that the prosecutor would not have said in that case, that this was an engagement to commit treason. And why would he not have said it? For no reason that the informant knows, but that, though a man *may* intend to levy war, in order to obtain annual parliaments and universal suffrage, this is not to be inferred, merely because he engages to support his endeavours for obtaining them to the utmost of his *power*. All his powers, moral and physical, are included in the terms; and yet the purport of an engagement to commit treason could never be stated. The informant confesses, he can see no solution of this, except by what the prosecutor is pleased to call a "reservation of illegality:" In plainer terms, that presumption of innocence, by which words, which admit of an innocent construction, or of a construction which is not treasonable, are not to be extended or twisted, so as to make out a guilty or traitorous design.

If the words had been, "That I will support the same to "the utmost of my *power*, with *my whole moral strength*," the design *might* equally have been to commit a treason: For undoubtedly, a treason may be committed by moral strength alone,—by writing letters,—furnishing money,—giving advice,—giving information,—encouraging, comforting, persuading others. But yet the prosecutor would scarcely have inferred an obligation to commit treason, if the oath had been so expressed. And *why* not? For no reason, but that, though treason *might* be so committed, the presumption of innocence would not allow the engagement to be so construed, when so many other suppositions, consistent with innocence, could be made.

The prosecutor's case, then, lies entirely in the supposed effect of the words, "or physical strength;" or, as he has now been pleased to express it, "or physical strength (or force)." Now, it is true, that a man who *undertakes to levy war may*, and most probably *will*, exert both moral and physical strength; but it does not follow, that *every* man, who engages to support certain endeavours for obtaining a public object, either by his moral or physical strength, as the case may require, necessarily *binds himself to levy war*, or to do any act of treason.

1. It is not an engagement to levy war, because the occasion may never arise. The parties may be contented with the exertion of their moral strength, and may even accomplish the object by these means. But, 2. There are just as many ways in which *physical* strength may be *lawfully* exerted for attaining such an object, as there are ways in which moral strength may be lawfully exerted. A man may make journies—he may print books—he may make speeches—he may work to procure money to pay the expense—he may erect hustings—he may use his physical strength in keeping off the crowd at a meeting—he may defend the meeting against an illegal attack. Innumerable other suppositions may be made, demonstrating, that the exertion of physical strength no more necessarily implies levying war, or any treason, than the exertion of moral strength does. But, 3. Either moral or physical strength may be employed *unlawfully*, and yet not have the least tendency to become an overt act, either of *levying war*, or of *any other treason*. A man may resist a magistrate, who requires the dissolution of an assembly, under the late statute; he may arrest a member of Parliament illegally; he may murder a prime minister; and he may do innumerable other minor acts, contrary to law, all for the purpose of accomplishing the object of annual parliaments, and universal suffrage; and yet it would be impossible to state that he had *levied war*, or was *guilty of treason*. There is no denying these things, and the prosecutor has not attempted to deny them.

But what is the consequence? It is, with submission, quite inevitable, that the engagement to support his endeavours by his physical strength, if the case may require it, is no more an engagement to levy war, or to commit treason, than the obligation to support those endeavours to the utmost of his power generally, or to support them by his moral strength, would be. For the very same principle of judgment applies. The thing engaged to be done *may include* the case of criminality, but it also may be reconciled either with a lawful intention, or with the contemplation of acts, which, though not lawful, have no relation to treason. The presumption in favour of innocence comes in, and the "reservation of illegality" is just as admissible, and as necessarily implied in this case as in the others.

Make the supposition for a moment, that this oath were *legal* and *binding*, according to its terms: The party bound might be obliged to make great exertions, in order to obtain

the object of annual parliaments, &c. But if he were required to murder the King, could it be stated that that was part of his engagement? Or suppose that he were required to *murder his own father*, or *his own wife*, or *his own child*, could it be said, that, because he had engaged to support his endeavours for a particular object with his moral or physical strength, as the case might require, he had therefore engaged to commit all manner of atrocities without distinction? It is plain that the engagement never could admit of such a construction.

The prosecutor's mistake is nearly the same, which he has announced in his general plea to the relevancy, when he says, that if, by *any possible construction*, the oath may bear the supposition of a treasonable design, that is enough to make it relevant. He assumes, that every imaginable case of the exertion of physical strength is undertaken, although he will not make the same supposition in the case of *moral* strength or *power* in general. But the informant humbly maintains, that, as he could exert his power, and exert his moral strength, and exert his physical strength, *all alike*, either *lawfully* or *unlawfully*, either *treasonably* or not *treasonably*, he is entitled in the last case, just as much as in the others, to the most favourable construction, and to hold, that the engagement was merely to use his strength in a lawful manner; but that, at all events, it did not purport an engagement to levy war, or commit treason.

The additional term, ' (or force),' which the prosecutor has introduced into this indictment, surely cannot alter the state of the question against the informant. It is stated as an alternative or synonymous term, though plainly not synonymous, and introduced for that very reason; and the introduction of it only shews the very uncertain data on which this prosecution has been raised. But it may be observed, that the prosecutor has not told your Lordships, *which* of these two words was employed, in any of the *particular* cases in which he charges the oath to have been administered by the informant; and he is here endeavouring to make a relevancy by mere guess, without affirming that the word now introduced was *actually* used in *any one* of the cases libelled in this indictment.

If the prosecutor means to say, that this was an engagement to support the endeavours by a combined physical force, it is an idea completely inconsistent with the words of the oath. For your Lordships will remember, that it is "*my* endeavours" that are to be supported, and the engagement is, "that I will support the same to the utmost of *my* power;"

the reference being constantly to individual exertions alone. It is only by construction, and the most violent implication, that this idea of a combined force can be at all maintained as involved in this oath. And, in short, it is impossible to call this an engagement to levy war, without entirely departing both from the rules of law on that subject, and from every correct idea of the qualities which are necessary to such an engagement.

The remainder of this oath contains an engagement to secrecy, to which the prosecutor frequently refers. But an engagement of secrecy, however improper it may be in itself, and however it may raise suspicions, and even belief, of criminal designs, will not make this oath to be an oath purporting to bind to levy war, or commit any treason, if there is no engagement *of this purport* in the rest of the oath. Such oaths of secrecy are known to exist, and that with peculiar sanctions, in societies which are not deemed to be contrary to any law. But even supposing the society to have had bad designs, it does not follow that there was an engagement to commit treason; and your Lordships will not violate the law, and proceed on principles of constructive treason, merely because the prosecutor has not taken the right way of putting a stop to proceedings which might be dangerous or illegal.

It is time to conclude this discussion. Your Lordships are here called on, for the first time, to decide on the relevancy of an indictment laid on a statute in the highest degree penal. The act was passed with a view to particular circumstances, which do not, and never did, exist in this country; and the truth is, that those who made it had more in their view the case of oaths binding to commit murder and other felonies, than the case of an oath binding to commit treason. Perhaps the case of treason was not well considered But be this as it may, it is humbly submitted, that, exclusive of the separate point, which is to be argued, if there was here an oath administered, purporting or intending to bind the party taking it to commit any known treason, there was no difficulty whatever in laying a relevant indictment for that offence. But it is now apparent, that the prosecutor's difficulties originate in the substance of the case. He *cannot* aver that the oath purported or intended to bind the party, *either to levy war*, or to *compass the king's death*, or to *conspire to levy war*, or to *adhere to the king's enemies*, &c. He sets forth an oath, which purports to bind to none of these treasons; and he refuses to make the averment, in direct violation of all the rules of cri-

minal indictments, plainly meaning, and almost avowing his intention, *to take the relevancy of the charge entirely out of the hands of the Court.*

In respect whereof, &c.

JAMES MONCREIFF.

July 10, 1817.

SUPPLEMENTARY INFORMATION

FOR

ANDREW M'KINLEY, *present Prisoner in the Castle of Edinburgh,*

AGAINST

ALEXANDER MACONOCHIE, *Esq. of Meadowbank, his Majesty's Advocate, for his Majesty's interest.*

THE prisoner has next to submit to the Court a view of the question totally different from those he has already offered, and in arguing which he is to proceed on the assumption, that those views which he has already stated are erroneous. For the purpose of this argument he is to assume, that the oath does, in its terms necessarily, and by due construction, purport and intend to bind the persons taking the same to commit treason; and that the specific treason, to the commission of which it did purport and intend to bind, is sufficiently set forth in this indictment.

Then the prisoner says, that the treason there set forth is, and can be, no other than the "levying war against the King, "in order, by force or constraint, to compel him to change his "measures or counsels, or in order to put force or constraint "upon both Houses, or either House of Parliament."

The accusation is, that the prisoner "did, at secret meet-"ings, and other occasions, at Glasgow, or in the immediate "vicinity thereof, wickedly, maliciously, and feloniously, ad-"minister, or cause to be administered, or did aid or assist at "the administering, to a great number of persons, to the "amount of several hundreds, an oath or engagement, or an "engagement or obligation in the nature of an oath, purport-"ing or intending to bind the persons taking the same to "commit treason, by obtaining annual parliaments and uni-"versal suffrage by physical strength or force, and thereby "effecting the subversion of the established government, laws, "and constitution of this kingdom, by unlawful and violent "means."

The prisoner has endeavoured to satisfy your Lordships, that this is not such an accusation as is sufficiently precise to

put a person upon his trial either for felony, or for high treason, or for any other crime. The crime provided against by the statute, is the administering an oath, purporting or intending to bind to the commission of any treason. Whether the oath does purport or intend so to bind, is a question of legal construction. and it depends on two propositions, *First*, What act it is which to do, the oath purports or intends to bind; *Secondly*, Whether that act be a treason. This latter question depends on the words of certain statutes, and your Lordships, in determining whether any act done, or proposed to be done, is, or would be, an act of treason, must look to the words of those statutes, as they are expounded by the decisions of the Courts, and must be satisfied that such act comes, or would come, within such words so expounded. This it is which, by your interlocutor of relevancy, you must necessarily declare, and this you cannot do, unless the words of the indictment are so framed that your simple affirmance of the proposition there set forth may amount to a distinct and sufficient judgment in law, that the fact alleged to be projected would, if carried into execution, amount to one or other of the treasons declared by statute. Your Lordships, in your interlocutor of relevancy, cannot vary from the terms of the indictment. By finding this indictment relevant, you do judicially declare, that "to obtain annual parliaments and universal suf-"frage by physical strength or force, and thereby to effect the "subversion of the established government, laws, and consti-"tution of this kingdom, by unlawful and violent means," is treason legally and sufficiently described.

The prosecutor affirms, that the oath purported to bind persons to commit treason, and that it bound them to do so by doing that which is here set forth. The doing that, therefore. he affirms to be the committing of treason, and he desires of your Lordships to pronounce a solemn judgment of this Court, declaring that it is so. in the terms with which he has supplied you. An indictment, therefore, against any person for committing treason, alleging that he has done what it is herein set forth that the oath in question purported to bind the persons taking it to do, and stating that allegation in the terms here employed, must hereafter, under this judgment of your Lordships, be a good and valid indictment of treason, since it would be conceived in terms which your Lordships have decided to be, in an indictment, a sufficient description of treason.

But there are no treasons in the law, unless by the 25th Edward III. or some subsequent statute, and your Lordships cannot declare this to be a legal and sufficient description of

treason, without declaring it to be a legal and sufficient description of some treason declared in that or some subsequent statute.

The declaration demanded of you by his Majesty's Advocate is not, that the committing a particular act *would amount to an overt act of some specific treason declared by statute*; but he desires that you should find that this is *a sufficient description of a treason, declared by your Lordships.*

In none of the statutes does this appear as the description of any sort of treason; and the demand of the prosecutor is this, that your Lordships, of your authority, shall declare *a new treason*, which is contrary to law and would be matter of impeachment. For it is a contradiction in terms to say, that your Lordships can declare that an oath purports to bind to the commission of high treason, because it purports to bind to do acts falling within a certain description, without declaring that that description is *a description of treason*; and it is a contradiction in terms to say, that it is *legally and sufficiently alleged* that an oath purports to bind to the commission of treason, by binding to do acts which would come within a certain description, without declaring that such description is *a legal and sufficient* description of treason.

Now, high treason is of two general descriptions. There is one which consists in the compassings and imaginations of the mind; and another, which consists in the doing some act. Treasons of the former description must be manifested by something actually done and performed, by which the treasonable compassing may be known; and to the due allegation of such treasons two things are necessary: *First*, To set forth, and legally to describe, the compassing and imagination constituting the treason; and, *secondly*, To set forth, with sufficient accuracy, the act done, from which such compassing and imagination is inferred. And the setting forth the act only, is not setting forth the treason, but what is meant to be given in evidence of the treason, and which can never *constitute treason*, till that from which an inference is drawn be confounded with that which is inferred; or until the evidence adduced shall be deemed the same thing with the averment which it is intended to prove.

In the second description of treasons—those which do not reside in the mind, but which consist in some act performed —*the description of the* ACT *is the description of the* TREASON.

In describing the treasons which reside in the mind, *the compassings and imaginations must be described in the terms of the statutes which declare them to be treason*, and the overt act must be so stated, that, if proved to follow from such compas-

sings and imaginations, it will amount to a manifestation thereof. In treasons which consist not in the intentions or wishes of the heart, *the fact committed must be set forth in the words of the statutes declaring it a treason.* Nor can, in either case, the statutory language be departed from, without holding out *a new definition of treason*, or demanding that the treason which is described in the statutes *may be inferred by construction*; both of which are directly contrary to law. If it be said, the description given is a description of what would constitute an overt act of some treason, then the prisoner replies, A description of the overt act is not a description of the treason, but of the evidence of the treason merely. The Court and the prisoner are entitled to have the treason alleged, of which the overt act it is said would be evidence, that the former may judge whether it would be so, and the latter may prepare to defend himself, by shewing that it would not. It is to no purpose to say, that the sort of treason is apparent, and the inference from the overt act quite plain. The rule must be general. Either the treason must be set forth in all cases, or it is necessary in none. The legal form of indictments cannot vary, by the capricious estimate that may be made of the convenience or inconvenience of dispensing with them in particular cases. If, in this case, it be unnecessary to set forth the treason, then this must be held for the general rule in indictments on this statute, and equally the rule as to oaths purporting to bind to commit *felonies*, notwithstanding their indescribable number and variety; though it is obvious that in many, or in most cases, this rule would be wholly inconsistent with justice.

If it be said, the thing alleged to be projected is itself the treason, then the prisoner replies, It is not a treason described in any of the statutes.

But in what he is now to offer, the prisoner, for the sake of argument, admits that this position is a mistake—that the description here given is a sufficient description of high treason—that it is not necessary to follow, in this instance, the words of the statutes by which the various treasons are created or defined—but that it is enough if the description be such as to convey to ordinary apprehensions, that the fact, if committed, would fall, or might fall, under some of the known legal descriptions of treason. The prisoner, therefore, must set himself to consider of what species of treason a person ought to be indicted, who hath done that which, in common language, and to a common intent, the allegation in the indictment would or might convey.

It is obvious, that no other treason can be meant than that

of levying war against the King. It may involve the compassing and imagining the death of the King, because the levying of war against the King, may well be an overt act of such compassing and imagining. For your Lordships know that it is laid down by Lord Hale, that "any assembly to "levy war against the King, either to depose, or restrain, or "enforce him to any act, or to come to his presence to remove "his counsellors, or ministers, or to fight against the king's "lieutenant, or military commissionate officers, is an overt act, "proving the compassing the death of the King, for such a "war is directed against the very person of the King, and he "that designs to fight against the King, cannot but know at "least it must hazard his life." And in Sir John Freind's case, who was indicted of high treason, in compassing and conspiring the death of the King, Lord Chief Justice Holt lays down the law, that "If there be only a conspiracy to levy "war, it is not treason; but if the design and conspiracy be "either to kill the King or depose him, or imprison him, or "put any force or restraint upon him, and the way and me-"thod of effecting of these is by levying a war, then the con-"sultation and conspiracy to levy a war for that purpose, is "high treason, though no war be levied; for such consultation "and conspiracy is an overt act proving the compassing the "death of the King.'

1 Hale 128.

4 State Trials, 625, 626.

Now if the loose words of this indictment are to be construed as describing any sort of known treason, the obtaining by physical strength that which effects the subversion of the established government, laws, and constitution, may be an assembly to levy war against the King, to depose him, and can hardly by construction, if treason may be made matter of construction, be less than the levying war to enforce the King to some act, or to put a force or restraint upon him, since it cannot be supposed that the King will consent to such subversion, and since he cannot, consistently with his duty and his oath, but oppose it at all hazards. But to effect this subversion by unlawful and violent means, through the obtaining annual parliaments and universal suffrage by physical force or strength, if they are words sufficiently certain and precise to amount to a legal allegation of any sort of treason, can mean nothing else than a levying of war, in order, by force and constraint, to compel the King to change his measures or counsels, or at any rate in order to put force or constraint upon both Houses, or either House of Parliament, since annual parliaments, and universal suffrage cannot be obtained but by an act passed by the two Houses, and by the King, and if this passing be obtained by violent means, which violence amounts to treasonable

violence, it can be no other than the putting such force or constraint either upon his Majesty, or upon one or other House of Parliament, as is above mentioned.

Further, if the levying of war, meant here to be imputed, be, as has been said, against the King's person, the compassing the King's death is the treason, and the conspiring to levy such war is an overt act thereof, under the statute of 25th Edward III. If the war to be levied were for the purpose, by force or constraint, to compel the King to change his measures, in order to put force on both Houses, or either House of Parliament, the compassing or imagining to levy such war is declared to be high treason during his Majesty's life, by 36th Geo. III. c. 7.; and of necessary consequence, the conspiring to levy such war is an overt act of such compassing and imagining.

It cannot be doubted that the administering, at secret meetings, and on other occasions, to a great number of persons to the amount of several hundreds, an oath, purporting or intending to bind these hundreds of persons to levy such war, amounts to a conspiring, and to an overt act of compassing such levying of war.

The prosecutor, therefore, is in this dilemma from which it is impossible he should escape. Either he has not sufficiently charged the felony under the act creating it, because he has not sufficiently alleged that the oath purported to bind to commit any treason;—which the prisoner says he has not: Or if he have sufficiently charged it, which the prosecutor says he has, then what he has charged amounts to an overt act of high treason; and this the prisoner undertakes to satisfy your Lordships cannot be tried on the indictment of the Lord Advocate, or according to the mode of trial which in this case has been adopted. The prisoner is aware, that mere words, unaccompanied by any acting, or any measure taken, do not constitute an overt act of any sort of treason, though, in particular cases, where the security of the subject appears to have been less regarded than the jealousy felt by the Crown, it has been otherwise held; but it never was doubted, that the assembling of persons together to conspire, or to consider of, or to bind themselves to commit, an overt act of any treason which consists in compassing and imagining, is in itself, without more, an overt act of such compassing and imagining. Thus, "if "there be an assembling together to consider how they may "kill the King, this assembling is an overt act to make good "an indictment of compassing the King's death." And in the case of Somervill, Arden, and others, it was resolved by all the Judges of England assembled, "that as to Arden and "the rest, that they conspired with the said Somervill, and

1 Hale, P. C. 119.

1 Anderson's Rep. 106.

"procured him to undertake to commit the treason which was "to destroy the Queen, was sufficient overt act, since they "were assembled to this purpose, and procured or en- "gaged him; for otherwise the procurers of treason might al- "ways escape punishment, if, after their procurement, they did "not proceed farther." And to the same purpose Serjeant Hawkins says, "It hath been resolved that conspiring to levy "war against the King's person may be alleged an overt act "of compassing his death." Hawkins, P. C. B. 1. c. 17. § 27.

The accusation in this indictment amounting in substance to a charge of high treason, manifested by an overt act, the prisoner humbly maintains, as consequent on this, three propositions:

1st, That this accusation, amounting to an accusation of having committed an overt act of treason, cannot, by the general and established rules of law, be tried as a felony under this or any other statute.

2dly, That by positive statute, 7th Anne, c. 21. it cannot be tried in Scotland, by the ordinary forms of the Court of Justiciary, or on an indictment by the Lord Advocate.

3dly, That there is nothing in the act 52d Geo. III. c. 104. on which this indictment is laid, which abrogates the rule of law above mentioned, or repeals the said statute of Queen Anne. Neither is any such alteration of the law to be inferred from any legal construction of the words of this statute of the King; nor is there any reason to believe that the legislature entertained any such intention.

1st, The prisoner humbly maintains, that the accusation against him, resolving in substance into a charge of high treason, cannot be tried as a felony.

The prisoner need hardly state, that the law of Scotland was, by the said act of Queen Anne, rendered the same in matters of high treason with that of England. The act declares, that what is treason within England, shall be adjudged treason within Scotland; that nothing shall be treason in Scotland which is not treason in England; and that the trial of treason in Scotland shall be the same as is used in England. Therefore the two questions, *1st*, What is treason in Scotland? and, *2dly*, How that which is treason shall be tried in Scotland? must be determined by the English law. In these respects, the law of England is a part of the law of Scotland; and if it be thus generally introduced into this country, and ingrafted upon our national law, it cannot be doubted that it was introduced wholly and entire, that all its principles and rules are our principles and rules in these matters, and that your Lordships, wherever a question of high treason arises, are

as much bound to judge according to the principles which govern the courts of law in England in such cases, both of what constitutes the offence, of the mode in which it must be set forth and alleged, and of how it may be tried and investigated, as, in a charge of theft, you are bound to adhere to the common and statute law of Scotland, to the principles of our own municipal institutions, and to the course of procedure established by the practice of your predecessors in the Court of Justiciary. To talk of introducing a system of law from a foreign country, in an extensive and important branch of the law, rejecting at the same time any of those rules and maxims which in its own country attend that part of its institutions, and regulate, extend, restrain, or modify their application, is in terms a contradiction, and would be in practice worse than an absurdity.

If, therefore, the facts charged in the present indictment would amount, according to the English authorities, to high treason, and if such facts committed in England could not be tried there as a felony,—if it be true that, in case of a trial in England for a felony, the trial must, by the law of England, be stopped, if the facts came out in evidence such as they are here alleged, and no verdict or judgment of the felony could be pronounced on such evidence,—then the prisoner maintains, that by the law of Scotland, this being the same in this matter as the law of England, no trial for felony can proceed in Scotland on this charge. If it could, then it is obvious, that the law of treason in England would be no longer the law of treason in Scotland, and the mode of trial in England would be no longer the mode of trial in Scotland; for offences amounting by the law of England to high treason, might nevertheless be tried in Scotland by a form of trial, by which the same offences could not be tried in England.

Information for His Majesty's Advocate, p. 19.

On this part of the subject the prosecutor has divided his argument into two averments. 1*st*, That the principle of the common law of England founded on, has no application to any trial in this Court, according to the law of Scotland. And, 2*dly*, That even in England it has no application to a trial for an offence against the act of the 52d of the King.

To the second question the prisoner will have to address himself hereafter. In the meanwhile, he is anxious to confine your Lordships' attention to the first, because if it be true that the principle of the law of England has no application to this trial, it were vain to inquire further what that principle is.

To the manner in which the prosecutor has met this objection, the prisoner's counsel can hardly undertake to do justice,

since they are compelled to confess, that there is much of his reasoning which they dare not pretend to understand. For the seeming respect with which he condescended to honour that stated at the bar for the prisoner, the prosecutor has thought it necessary to apologize, by accounting for it from the impression on his mind at the time, that the argument must have something in it he was unable to discover; and to atone for it by declaring, that he has now ascertained that there was no discovery to make. The prisoner's counsel are by no means in this situation. On the contrary, from the beaten track of an inquiry into the application of some simple and well-known principles of law, they have found themselves suddenly transported into unexplored regions, where discoveries are made at every step, and propositions equally new and surprising start up at every turning.

In one sentence the prisoner finds, 1*st*, That "though it is understood to be a principle in English law, that *if a man be tried for an offence as a felony, which in fact amounts to treason, he must be* ACQUITTED;" yet "*there is no authority for saying, That a man cannot be* TRIED *for felony when his offence amounts to treason.*" And, 2*dly*, "*That the jury alone can judge,* WHETHER HE HAS COMMITTED TREASON OR NOT." The first of these propositions amounts to this, that where a man cannot be lawfully convicted, he may yet be lawfully tried; and is so stated, *totidem verbis*, in the next sentence but one, for it is said, that "this objection derived from the law of England IS AN OBJECTION TO A CONVICTION, AND NOT TO A TRIAL." So that it is no objection to the putting a man on his trial, that no conviction can follow, nor any reason why your Lordships should not send an indictment to the knowledge of an assize, that, if all the facts are proved as laid, the assize cannot lawfully convict. That is, the Court and jury are to sit and try causes for the amusement of my Lord Advocate, or the Attorney-General, where no result can take place; and prisoners are to be exposed to torture, and to danger, for the sole purpose of this inhuman diversion. And this it is said, "the terms of the act (52d of the King) show, which take for granted, the possibility of a trial for an offence under the act, which offence may turn out to be treason. If no person can be tried for an offence against the act, which offence may at the same time be treason, this clause implies an absurdity." What this clause does imply, will be afterwards shown. But assuredly it implies no such absurdity as this, that it meant to authorise the trial of persons under circumstances in which they cannot be lawfully convicted.

Inf. p. 19.

But if this proposition be astonishing, the second, by which it is meant to be supported, is not less so. The counsel for the prisoner had always believed, that whether certain facts amounted to a certain crime, was a *question of law*—of which, in Scotland, the Court disposed on the showing of the indictment, by their interlocutor of relevancy—and on which, in England, as the facts came out in evidence, the Court may stop the trial, or direct an acquittal, or direct a special verdict; and which, after trial, may be judged of there by the Court, either on a special verdict, or on a motion in arrest of judgment on the evidence. They have now learned, that they have all along been miserably deceived, for they have it on grave authority, that "whether what a man has committed be treason or not, *the jury alone can judge*;" and "that "one accused of felony cannot be acquitted on the ground "that he has committed treason, *unless the jury are satisfied "of this upon the evidence.*"

These, and some other observations, are stated to be *such an answer as may be made in an English Court to this objection.* This the prisoner must be permitted to doubt; although it appears to the prosecutor *quite conclusive and satisfactory.*

P. 21. But the argument by which the prosecutor would prove, that "the principle of the law of England, as to the merging "of felony in treason, has no application whatever to trials "before the criminal courts of Scotland," is too curious to be passed over.

It is said, that "it will not do to say generally, that the "whole doctrines of the English law, as to treason, have been "introduced into Scotland;" though it is admitted to be enacted by the statute of Queen Anne, that "all crimes and offences which are treason in England shall be treason in "Scotland." And it is asked, "whether this compels the "prosecution of any crime as treason, *which may be tried un*"*der another and lower denomination?*" With great deference the question is, *whether or not it may be so tried?* It is quite true, that the rendering of those offences treason in Scotland which are treason in England, would of itself make no alteration in the mode either of prosecution or of punishment. But the act goes a great deal further. For by sect. 3. it is enacted, that "the Justice Court, and other courts, having "power to judge in cases of high treason and misprision of "high treason in Scotland, *are required to enquire by the "oaths of twelve men* in the shire or stewartry where the "Courts shall sit, *of all high treasons* and misprision of high "treason committed within the shires or stewartries, and

" thereupon to *proceed, hear, and determine* offences, whereof
" any person shall be indicted before them, *in such manner as*
" *the Court of Queen's Bench, or Justices of Oyer and Termi-*
" *ner in England may do.* And if any person be indicted of
" high treason, &c. before any Justices of Oyer and Termi-
" ner, or of the Circuit Courts, &c. upon the request of the
" Queen's Advocate General, the Lord Chancellor shall
" award her Majesty's writ of *certiorari* directed to the Justi-
" ces of Oyer and Terminer, &c. commanding them to certify
" such indictment into the Justice Court, which Court *is re-*
" *quired to proceed upon, hear, and determine the same as the*
" *Court of Queen's Bench in England may do;* and all per-
" sons convicted or attainted of high treason or misprision of
" high treason in Scotland, shall be subject to the same cor-
" ruption of blood, pains, and forfeitures, as persons convicted
" or attainted of high treason or misprision of high treason in
" England."

What is there wanting in this act to make up the proposition, that " *the whole doctrines of the English law as to treason* " *have been introduced into Scotland?*" There is here a declaration that the same thing shall constitute the offence; that the mode of inquiry, indictment, and trial, shall be the same, and that the same pains and forfeitures shall follow on conviction. How can it be said, that " the previously existing P. 21.
" common law of Scotland has not, in relation to offences which P. 22.
" amount to treason, been by this declaration of the legisla-
" ture abrogated?" or that to assert this, is " to take away the
" principles of our common law by implication?" How can it be said, " that it is neither said nor implied, that such of-
" fences shall always be tried as treason?" Whether an offence amount to treason or not, does not depend on the denomination which the Lord Advocate may think fit to bestow upon it. It is not the doctrine of the law of Scotland, that the Lord Advocate may prosecute one crime, under the denomination appropriated to another—murder under the denomination of theft—or treason under that of murder. But that, where a crime consists of various species, or degrees of guilt and aggravation, he may indict for the lower species, or for circumstances of inferior aggravation, in order to restrict the punishment; as, having indicted for an offence capitally, to which a capital punishment is affixed, he may, if he thinks proper, on the same indictment, restrict his charge to the inferring an inferior punishment. He may also, where two crimes have been committed, indict for the one and not for the other, if he thinks fit, as he may in his discretion abstain from indicting altogether. But he cannot alter the nature of the

offence committed, or declare that, that which constitutes one sort of crime shall be held to constitute another, or that, that which constitutes a certain crime shall be held not so to do.

The prosecutor's argument is this, That by denominating certain acts felony, he may try them as felony; that by refusing to call them treason, he may alter their nature, and dispense with the statute regarding them. Whereas the previous question is, To what offence do these facts amount? Do they constitute any high treason? If they do, it is clear they are within the statute of Queen Anne, and there is no longer any room for talking of the powers of the Lord Advocate, or of the rules of the common law of Scotland, which, in this case have no more application, than they would have in a country removed beyond the jurisdiction of your Lordships.

It is really to no purpose for the prosecutor to say, that the law of treason introduced by the act of Queen Anne, is entirely statutory, and has nothing to do with the common law of
P. 22. England, or to congratulate himself on the total ignorance in which he is presumed and entitled to remain on this subject. What is introduced by the act of Queen Anne, is the whole law of England, whether by statute or by common law, regarding high treason, its trial, and its punishment. Whether the rule contended for arises from "a general principle "of the common law of England, *not peculiar* to the law of treason," is not the question. Is it a principle of the law of England *applicable* to cases of treason? If it be, then it is a principle introduced into Scotland in cases of treason by the act of Queen Anne. But that the whole law of England as to treason is transferred to Scotland, is admitted by the prosecutor. For he states that "it is impossible to "dispute, that in the legal definition of the crime of trea-"son; in the mode and form of process by which it is to be "tried; in the rules of evidence by which it is to be establish-"ed; in the mode and effect of conviction and punishment; "in short, in the whole process from the commencement to "the termination, the law of England is transferred to Scot-"land. But," he adds, "AT THIS POINT the transference "of the English law, and the innovation upon the Scotch law, "*stop short*," that is, *at the termination of the whole process.* The prisoner is precisely of this opinion, that after having determined the definition of the crime, the whole course of procedure, and the punishment, the influence of the English law stops, and leaves your Lordships to define, investigate, and punish other crimes according to the rules of our ancient municipal law. Whether this can be called "stopping short," he does not presume to determine.

The prisoner, therefore, will apply himself first of all to prove, that an offence amounting on the evidence to what is here attempted to be charged, and insisted to be sufficiently charged, could not in England be tried as a felony, under this or any other act of Parliament.

The rule of the common law of England is this, "Treason "drowns felony;" or, as it is otherwise expressed, "Felony "merges in treason." And in general, by the rule of the common law of England, the greater offence drowns the less.

Thus, in the year-book, 31st Hen. VI. 15. it was agreed, that if a man be indicted, arraigned, and acquitted of the robbery of J. S. he (meaning J. S.) shall not have trespass, for the trespass is extinct in the felony, *et omne majus trahit ad se minus.* 31. Hen. VI. 15. Broke's Ab. Trespass, 145.

And no trespass lies for what appears to the Court to be felony. So no action of trespass lies by the husband for a battery of the wife, by which she languished for six weeks, and then died of the same blow, for this is felony. Though for the battery of the wife, by which he lost her society for a certain time, an action of trespass does lie by the husband alone. And in Dawkes *v.* Coveneigh, Mr. Justice Jones, citing the above case of Huggins, says, "If the party robbed may have "his election, either to indict the felon, or to have his action "of trespass, this would prove very dangerous." And Lord Chief-Justice Roll gives the same reason for an action of trespass lying when the facts amount to a felony, namely, the danger the felon might not be tried. Huggins' Case, 4 Jac. I. 2 Roll's Ab. 557. Ibid. 556. Pl. 16. Stile's Rep. 347-8.

In like manner, it is laid down, 3d Hen. VII. 10. by Hussey C. J. "There can be no accessary in treason. *The re-* "*ceiving a traitor cannot be only felony*, (le resetment de traitor ne poet esse *tantum* felony), but is treason, *et in casu* "*ibidem.*" Year-Book, 3. Hen. VII. 10. Broke's Ab. 19.

Saccombe's case, 33d Hen. VIII. is thus reported by Lord Chief-Justice Dyer: "A woman had poison'd her husband, "which offence is made treason about the 31st Hen. VIII. "(23d Hen. VIII.); and by the general pardon granted by "Parliament in 32d Hen. VIII. this offence was pardoned. "Now the son had brought appeal of murder against the wife. "The question was, Whether this appeal lies? And some "thought, that because the offence is made treason, it mer- "geth each lesser crime, as the crime of murder, which was "before at common law; and so the offence is not punishable "as murder, but as treason, and so no appeal lies. But some "were of a contrary opinion, &c. But the opinion of the "Judges was, that the appeal was not maintainable." And the reporter refers to the case 3d Hen. VII. above stated. Dyer's Rep. 50. a.

And in Coke's Rep. in "the cases of pardons," 29th Eliz. it
6. Coke's Rep. 13. b. is laid down: "If murder or petit treason be made high trea-
"son, thereby the murder or petit treason is extinct, *for high*
"*treason doth drown every less offence.*"

And it hath been held, that petit treason, which is in fact an aggravated species of murder, being the murder of a husband by his wife, or of the master or mistress by a servant, which are declared to be treasons by 25th Edw. III., in like manner drowns and extinguishes the felony of murder.

It is very true, that it is questioned whether petit treason be in truth an offence of a distinct sort from murder. Lord Hale thinks not; for he says, that all petit treason comes under the name of felony. But so, of old, did high treason also.

Judge Foster also is at much pains to show, that petit treason is an offence of the same nature with murder.

Be this, however, as it may, Judge Foster's opinion is conclusive, that *by the common law of England, all felonies merge in the offence of high treason; and an act amounting in its circumstances to an act of high treason, cannot by the law of England be tried as a felony.*

Dyer's Rep. 50. 25th Hen. VIII. supra. "There is a case in Dyer," says the learned Judge, (the case cited above), "which hath been thought to favour the "opinion, that the crime of murder is merged in *petit treason*, "and that a pardon of treason discharged it, notwithstand-"ing the exception of murder; but that case proveth nothing "like it. A wife, about the 31st Hen. VIII. poisoned her "husband. Then came a general pardon by which treason "was pardoned, but with an exception of wilful murder. The "heir brought an appeal of murder against the wife, and it
Foster, Crown Law, 325. "was adjudged that the appeal did not lie. This case doth "not prove that murder is merged in petit treason, but that "*both murder and petit treason were merged and extinguished* "*in the offence of high treason;* for at that time, by virtue of "the 22d Hen. VIII. all wilful poisoning was high treason, "*and being so, the appeal,* not being saved by the act, *was* "*barred,* WHETHER THE TREASON HAD BEEN PARDONED "OR NOT."

Deeming that manslaughter, murder, and petit treason, are various species of criminal homicide, Judge Foster concludes, that if, upon an indictment for murder, the facts should turn out to be *petit treason*, he does not think it advisable to direct a verdict of acquittal, for fear it should avail the prisoner on a subsequent indictment for murder. But he by no means thinks that in such a case he ought to be convicted, for he
Ib. 327. says, "Though I am satisfied that the law considers petit "treason and murder as one offence, differing only in circum-

" stance and degree, yet, whether it may be advisable to pro-
" ceed upon an indictment for murder against a person plain-
" ly appearing to be guilty of petit treason, is a matter that
" deserveth great consideration, and probably determined the
" Attorney-General to prefer a fresh bill for petit treason in
" Swan's case," (who had been first indicted of murder, and the Attorney-General discovered before the trial that the deceased was his master). " For though the offences are to most
" purposes considered as substantially the same, yet as there
" is some difference between them with regard to the judg-
" ment that is to be pronounced upon a conviction, *and a very*
" *material one with regard to the trial, a person indicted for*
" *petit treason being entitled to a peremptory challenge of* 35,
" I think, if the prosecutor be apprised of the true state of the
" case, as he may be if he useth due diligence, he ought to
" adapt the indictment to the truth of the fact. But if,
" through mistake on the part of the prosecutor, or through
" the ignorance or inattention of the officer, *a bill be prefer-*
" *red as for murder, and it shall come out in evidence that the*
" *prisoner stood in that sort of relation to the deceased which*
" *rendered the offence petit treason*, I do not think it by any
" means advisable to direct the jury to give a verdict of ac-
" quittal, for a person charged with a crime of so heinous a na-
" ture ought not to have the chance given him by the court
" of availing himself of a plea of *autrefoits acquit*. In such
" a case I should make no sort of difficulty *of discharging the*
" *Jury of that indictment, and ordering a fresh indictment for*
" *petit treason*. In this method *the prisoner will have the ad-*
" *vantage of his peremptory challenges*, and the public justice
" will not suffer."

Upon this two observations arise. *First*, That though the offences are substantially the same, the greater advantages afforded by the law to the prisoner on the trial, in the peremptory challenge of 35 of the jury—in the requiring two witnesses—and other circumstances beyond what are allowed in trials of murder, entitle the prisoner, in Judge Foster's opinion, to be indicted for petit treason, if his offence amount to that description, and to have the indictment dismissed, if through mistake, or ignorance, or inattention in the prosecutor, it be preferred as for murder, and it comes out in evidence that his relation to the deceased renders the offence petit treason. *Secondly*, That if petit treason were to be considered as a distinct species of offence, of another and higher description, (as high treason compared with felony,) an acquittal must follow, if the facts on the evidence should amount to the higher crime.

The prisoner thinks, therefore, that your Lordships will be satisfied from what is above stated, that there is no doubt whatever, but, by the common law of England, all inferior offences are merged and extinguished in the offence of high treason. The case in the 33d Hen. VIII. in Dyer's Reports, as explained by Mr. Justice Foster, is by him declared to be law; and he states expressly, that in that case, though the crime committed was murder, yet it being also treason, *the murder merged in the treason*, and the trial, appeal, or indictment for murder, was therefore barred by the rule of law, independent of the question arising out of the subsequent pardon. Indeed, when that learned Judge declares, that where, *notwithstanding there be a difference in the punishment*, yet *there being also a difference in the mode of trial*, one indicted for *murder* cannot properly be convicted, if on the evidence the offence turn out to be *petit treason:* although that learned Judge is so clearly of opinion, the two offences are but *shades of the same generic crime* that he thinks it doubtful whether the prisoner may not plead an acquittal of the murder, in bar of the second indictment; when he declares, that in such a case the judge should rather take the strong step of discharging the jury without their finding a verdict, *in order that the prisoner may be tried with those advantages to which the law has entitled him;* he could not but be of opinion, that where the crimes are essentially different in their nature, it is impossible *to deprive a prisoner of the benefits of the mode of trial appointed for the crime he is truly accused of, under pretext of assigning to it an inferior denomination.*

II. But, in the second place, if this be true generally by the principles of the common law of England, which in this matter is the law of Scotland also, in the latter country, the necessity of adhering, in all cases of treason, to the form of proceeding which the law has prescribed for the trial of such cases, is yet more imperative. In this country, the duty of proceeding according to a particular form and mode of trial, is imposed on your Lordships by positive statute.

The act 7th Queen Anne, c. 21. has not only declared, that "such crimes and offences which are high treason with-"in England, shall be construed, adjudged, and taken to be "high treason within Scotland;" but it positively commands that all acts of treason shall be inquired into, and tried in Scotland in the same manner as is used in the Court of King's Bench, or by the Justices of Oyer and Terminer in England.

Your Lordships know, that in that act there is not only a permissive clause, enabling the Queen and her successors to

issue out commissions of Oyer and Terminer in Scotland under the great seal, to hear and determine cases of high treason; but by § 3. it is enacted, "That the Justice Court of "Scotland shall have full power and authority, *and they are "hereby required to inquire by the oaths of twelve good and "lawful men*, of the county, shire, or stewartry where the re- "spective courts shall sit, of all high treason and misprision "of high treason committed within the said county, &c. and "thereupon to *proceed, hear, and determine*" (that is, *they are required to* proceed, hear, and determine), "*the said offences* "of any persons who are indicted to stand before them, *in* "*such manner as the Court of King's Bench, or the Justices* "*of Oyer and Terminer in England, may do by the laws of* "*England.*"

Here, then, is a positive enactment *requiring and commanding* your Lordships to *inquire into, hear, and determine all questions of high treason, in the same manner as the Court of King's Bench does in England, and in no other.* If your Lordships were to hear and determine any question of this sort, by any other manner of proceeding, there cannot be a doubt that it would be a direct breach of this act of Parliament; and it will hardly be contended that the question, Whether a fact committed be an act of high treason, or an inferior offence? depends on the words in which the public prosecutor may choose to charge it. This were an evident absurdity; for thus it would be in the power of the public prosecutor, at his pleasure, to dispense with the law. It is not here the question, Whether the public prosecutor shall restrict his charge, or dispense with part of the punishment? but, *Whether he shall dispense with the* MODE OF TRIAL *which your Lordships are commanded by statute to observe?* It is to no purpose to say, that if he takes from the prisoner the advantage conferred on him by law in the mode of trial, he compensates this by so framing his accusation as to infer a more limited punishment. It were a sufficient answer to say, that this is contrary to law. But it can hardly be gravely asserted, that, in the present instance, any such compensation is offered, since what the prosecutor demands is nothing less than the life of the unfortunate man who now addresses you; and with what further consequences his conviction is to be attended, is equally unimportant to himself, to those in whom he is interested, and to the public. That because he waves certain consequences following conviction on an indictment of high treason, in the corruption of the blood, and the infliction of some senseless indignities on the lifeless body of the criminal, the public prosecutor shall be permitted to prosecute him to a conviction of death, from

which he is entitled to believe he might escape, if not deprived of the mode of trial appointed by law, under the circumstances in which he stands, is a proposition so monstrous—so inconsistent with substantial justice—so opposite to every doctrine of any law—and so totally irreconcileable to the humane principles of British law, that the prisoner is incapable of reasoning upon it. He cannot adequately express his surprise, that it should ever have occurred to any person, as one on which it was possible for a court of justice to consent to proceed.

And that the legislature, in passing the said act of Queen Anne, was aware, that from that time no act which amounted to high treason could be tried in Scotland by the usual forms of the criminal courts, appears from this, that, lest there should be any doubt respecting those crimes which had been treason before by the law of Scotland, but which by this act were declared to be so no longer, it was thought proper, by the 7th section, to enact, "That theft in landed-men, murder under trust, wilful fire-raising, firing coal-heughs, and assassination, which were declared to be treason by particular statutes in Scotland, should thereafter only be judged and deemed to be capital offences," &c. "And the persons committers thereof, are to be punished *and tried* in the same manner as by the laws of Scotland is provided in the cases of other capital crimes, any thing in this act to the contrary notwithstanding."

III. In the *third* place, the prisoner has to submit, that there is nothing contained in the act 52d Geo. III. c. 104. on which this indictment is laid, which abrogates the general rule of law, that an act of treason cannot be tried as a felony, or repeals the said statute of Queen Anne, by which your Lordships are bound to inquire of, hear, and determine all acts of treason, in such manner as the Court of King's Bench, or the Justices of Oyer and Terminer may do.

The prisoner undertakes entirely to satisfy your Lordships, that by no just rule of construction can this act 52d of the King be held so to do—that it contains no words sufficient for this purpose—that it is not to be inferred, either from its general scope, or any of its enactments—that such a construction was not in the view of the legislature when it was passed—and that it would involve the most manifest absurdities.

There can be no doubt that the statutes 1st Edw. VI. c. 12. requiring two witnesses in cases of treason, and 5th and 6th Edw. VI. c. 11. confirming this provision, and requiring that the witnesses, if living, shall be examined in person in the open

court; the 1st & 2d Phil. & Mar. restoring in all cases of treason to the prisoner, the peremptory challenge of 35 jurymen; the statute 7th Will. III. c. 3. confirming these privileges, and adding other valuable ones, such as the allowing the prisoner a copy of his indictment, the assigning him counsel, limiting the time of prosecution, and so on, are statutes for the benefit of the subject, and in favour of life. As little can it be doubted, that the act 7th of Queen Anne, limiting and defining cases of treason, introducing into Scotland the same mode of trial as in England, and allowing the prisoner a list of the witnesses against him, is of the same nature. Many valuable privileges belong to the subject in Scotland when accused of ordinary crimes, which are not conferred by the law and practice of England; but in the case of high treason, he has, by the law of England, all the same privileges, as by the law of Scotland in ordinary crimes; a copy allowed him of his indictment, counsel to conduct his defence, and two witnesses necessary to be produced against him. And to these other valuable privileges are superadded, his indictment is not the discretion of a law-officer of the Crown, but must be found by a grand jury on their oaths; he has a peremptory challenge, without cause shewn, of 35 of his jury; and the jury to convict him must be unanimous.

Of these acts, therefore, the prisoner thinks himself entitled to say, that they are to be interpreted favourably for the subject, and strictly against him; and that it would be contrary to all the rules of law to hold, that they may be repealed by implication. Nothing less than the express will of the legislature can be sufficient for this purpose, and this will conveyed in distinct words of repeal. It might be a question, whether, if a subsequent act were passed, *which could receive no effect* consistently with such acts continuing in force, this would of necessity repeal them in the same manner as positive and direct words to that effect. But the prisoner submits, that there can be no doubt, *where a subsequent statute may receive effect to many essential purposes*, although there be some to which it will not apply, unless by operating the repeal of former laws of the nature which has been described. In this case, according to no received rule of construction, can the subsequent statute be held to operate such repeal without express words.

The clauses of the act 52d Geo. III. c. 104. which affect the present question, are, the first, the seventh, and the last. The 1st clause is in these words: "That every person who "shall, in any manner or form whatsoever, administer or "cause to be administered, &c. any oath or engagement, pur-

" porting or intending to bind the person taking the same, to " commit any treason or murder, or any felony punishable " by law with death, shall, on conviction thereof by due " course of law, be adjudged guilty of felony, and suffer death " as a felon, without benefit of clergy." The seventh clause enacts, " That any offence committed against this act, if " committed in that part of Great Britain called Scotland, " shall and may be prosecuted, tried, and determined, either " before the Justiciary Court at Edinburgh, or in any of the " Circuit Courts in that part of the United Kingdom." The clause provides and declares, " That any person who shall be " tried, and acquitted or convicted of any offence against this " act, shall not be liable to be indicted, prosecuted, or tried " again for the same offence or fact as high treason; and that " nothing in this act contained shall be construed to extend " to prohibit any person guilty of any offenee against this act, " and who shall not be tried for the same as an offence against " this act, from being tried for the same as high treason, or " misprision of high treason, in such a manner as if this act " had not been made."

There are here no express words repealing any of the acts above mentioned, which confer on the subject the privileges he is entitled to when accused of an offence amounting to the crime of high treason. There is not even an allusion to any of these statutes, or the insertion of the usual general words where it is intended to introduce any alteration in the law; " any law or practice to the contrary notwithstanding." If, therefore, these beneficial statutes of Edw. VI. Phil. & Mar. William III. and Anne, are to be held repealed, it is evident that they can only be so by inference and implication.

It were a waste of your Lordships' time, to argue at length, that the general rules of the common law are not to be held abrogated by implication, much less are positive statutes enacted for the benefit of the subject in favour of life and liberty. To take an instance that happens at the moment to occur, the act 19th Geo. III. commonly called the comprehending act, empowered the commissioners of supply in Scotland, to examine such persons as were brought before them, and if found within the description of the act, as able-bodied, idle, and disorderly persons, &c. to deliver them over to the military officers of the King for recruiting the forces; and it was declared, " that from and after such delivery, &c. every per- " son so raised, shall be deemed a listed soldier to all intents, " &c. and shall not be liable to be taken out of his Majesty's " service by any process other than for some criminal matter;" and it was contended, that no civil court, therefore, could give

any relief from the adjudication of the commissioners. But in the case of Pattillo *v.* Sir William Maxwell, and in Cooper *v.* Sir John Ogilvie, the Court of Session were of opinion, that "their powers of reviewing the sentences of the commissioners, *arising from their inherent and constitutional jurisdiction*, were not excluded by this statute." And, in like manner, in the case of Guthrie *v.* Cowan, which was a conviction by the Justices of the Peace, under 39th Geo. III. c. 66. to prevent the damaging of raw hides and skins, by which act the Justices at quarter-sessions, on appeal, "*are empowered finally to hear and determine the same;*" and still more to mark the intention of the legislature, it is enacted, that "no such judgment or conviction shall be removeable by "*certiorari* into any Court whatsoever." Yet the Court of Session were of opinion, that *where the privilege of appeal to the supreme Court was not explicitly prohibited, an exclusion of its jurisdiction was not to be presumed.*

June 25. 1779. Aug. 10. 1780. June 22. 1781. Dec. 1788. Dec. 10. 1807.

But the prisoner must revert once more to what he has already endeavoured to urge on your Lordships' particular attention, that this question, How this offence is to be tried? must be decided by your Lordships by the principles of the English law; for it is no other than a question, of how a matter constituting the crime of high treason is to be tried? as to which, both according to the general purport and effect, and by the particular words of the statute of Anne, your Lordships are to proceed in the same manner that the Court of King's Bench in England would proceed.

If therefore the prisoner can satisfy your Lordships, that this act of the 52d of the King cannot be held, according to the law of England, to authorise the trial of this offence otherwise than as high treason; he thinks your Lordships will have no difficulty in deciding, that the same rule of construction must be adopted in this Court. It would be sufficient for this purpose to remark on the strange and anomalous situation in which the subjects of the opposite ends of the island would be placed, if your Lordships were to hold this act a virtual repeal of the treason laws *pro tanto*, while no such construction could take place in England; thus, supposing that the legislature intended to deprive the inhabitants of Scotland of benefits carefully conferred on them at the union, while yet it left these benefits entire for the enjoyment of our more fortunate neighbours.

That it is a rule of the common law of England, that an act amounting to high treason, cannot be tried as an inferior species of offence, has been made apparent.

In the construction of statutes, it is a general rule in the law of England, that a statute ought to be "construed ac-

"*cording to the reason and rule of the common law.*" This is so laid down by Lord Chief Baron Comyns, quoting Plowden's Commentaries, an ancient book of great authority.

Comyns' Dig. v. Parliament, R. 12.

And in the modern case of Eton College v. the Bishop of Winchester, it is laid down by the Court of Common Pleas, that even private acts are subject to this rule. "Private acts "of Parliament," it is said, "must be construed according to "the principle of the common law." A general custom, as is well known, is nothing else than part of the common law. And it is said by Lord Coke, "there is a diversity between an act "of Parliament in the negative and in the affirmative; for an "affirmative act doth not take away a custom." And the learned editor, Mr. Hargrave, has the following note on this passage. "This rule, about affirmative statutes, is very "common in the books," and he refers to Plowden's Commentaries. "In another place," he adds, "Lord Coke lays down a like rule, as to these not taking away the common law, but with more particularity; for his words are, that *a statute "made in the affirmative, without any negative expressed or "implied, doth not take away the common law.*"

8 Wilson's Rep. 496.

Coke, Littleton, 115. b.

Coke's 2d Inst. 200.

And Lord Coke says, "It appears in our books, that in "many cases the common law will control acts of Parliament, "and sometimes adjudge them to be utterly void; for when "an act of Parliament is against common right and reason, "or repugnant, or impossible to be performed, the common "law will control it, and adjudge such act to be void."

8 Coke's Rep. 118.

As in a grant to the King, a reservation by act of Parliament to the donor of *Services*, "the common law controls it, "and adjudges it void as to the services, for it is against rea"son that the King should do services."—"So, if an act of "Parliament gives to any to hold all manner of pleas within "his manor of D. yet he shall hold no plea to which he him"self is party, for *iniquum est*," &c. And elsewhere he says, "This case is of necessity by construction excepted out of the "statute."

2 Inst. 25.

And in like manner, speaking of a certain action, an action of waste, whether, under the statute of Glocester, it may be brought against the assignee of one having a life estate as tenant by the courtesy, the words of the statute being general, that it may be brought against him that holdeth by law of England, *or otherwise for term of life*, Lord Coke says, "Al"beit the assignee of the tenant by the courtesy is *within the "letter of this law* yet no action of waste shall be brought "against the assignee; for *in construction of statutes, the rea"son of the common law giveth great light*, AND THE JUDGES "AS MUCH AS MAY BE FOLLOW THE RULE THEREOF."

Coke, 2 Inst. 301.

The prisoner, therefore, assuming it to be sufficiently proved, that the rule of the common law in his case is as he has stated it, humbly contends, that the statute on which this indictment is laid, must be interpreted agreeably to that rule of the common law if possible. That an officer of the Crown should at his pleasure, by calling an offence by one name instead of by another, deprive the subject of that mode of trial, to which, under such circumstances, the law has entitled him for his benefit, *is against common right and reason*, and therefore nothing less than express words can induce your Lordships so to interpret an act of Parliament. Nor is it possible that the Court shall shew less anxiety to protect the rules of the common law, in cases of such inferior interest as are above stated, than in a case of life and death, where the subject is under an accusation which the law considers as calling on it to watch over his safety with peculiar jealousy.

In like manner, it is the general rule in interpreting subsequent acts of Parliament, so to expound them as *that they may not contradict former statutes*, which they do not expressly contain words to repeal. Thus, it is laid down in Roll's Reports as a general rule, *leges posteriores priores contrarias abrogant*. But it is said, "This cannot be by ambiguous and gene-
"ral words." And it is stated as a rule, that "when two gene-
"ral statutes are made, and one contradicts (apparently) the 2d Roll's Rep. 410.
"other, both if they can be, shall be so expounded, that the
"one may not contradict the other. *And a subsequent act,*
"*which* CAN *be reconciled with the former, shall not be a repeal*
"*of it.*"

In like manner, Lord Coke lays down the rules for interpreting subsequent statutes, with reference to former ones, as follows. Having agreed to the general rule above mentioned, *leges posteriores priores contrarias abrogant*, he observes, that "as to this purpose *contrarium est multiplex.*

"1*st*, If one is an express and material negative, and the 11 Coke's Rep. 63. a.
"last is an express and material affirmative; or if the first is
"affirmative, and the latter negative.

"2*dly*, Although both are affirmative; as by the statute
"33d Hen. VIII. c. 23. it is enacted, That if any person be-
"ing examined before the King's council, or three of them,
"shall confess any treason, misprision, or murder, or be by
"them vehemently suspected, he shall be tried in any county
"where the King pleases, by his commission, &c. And af-
"terwards another law was made, 1st & 2d P. & M. 10. in
"these words, *that all trials hereafter to be had for any trea-*
"*son shall be had according to the course of the common law,*
"*and not otherwise.* This latter act, although the latter
"words had not been, had abrogated the former, because they

" were contrary in matter. But it doth not abrogate the " statute 35th Hen. VIII. c. 2. of trial of treasons beyond the " seas, *notwithstanding the negative words*, because it was not " contrary in matter, *for that was not triable by the common* " *law.*

" *3dly*, Contrariety in respect of the form prescribed, &c. " *Only it must be known, that forasmuch as acts of Parliament* " *are established with such gravity, wisdom, and universal con-* " *sent of the whole realm, for the advancement of the common-* " *wealth, they ought not, by any constrained construction*, OUT OF " THE GENERAL AND AMBIGUOUS WORDS OF A SUBSEQUENT " ACT, *to be abrogated, but ought to be maintained and supported* " *with a benign and favourable construction.*" And he illustrates this by a case in the 21st of Eliz. in which it was found, that the act 16th Rich. II. c. 5. which enacts, that *all the lands and tenements* of one attainted in a præmunire shall be forfeited to the King, had not repealed the statute *de Donis*, authorising the creation of estates-tail, and that *the tenant in tail should notwithstanding forfeit only for his life.*

4 Term Rep. 2.

Thus, Lord Kenyon says, " There are several cases in the " books to shew, that where the intention of the legislature " was apparent, that the subsequent act should not have such " an operation, there, even though the words of such statute, " taken strictly and grammatically, would repeal a former act, " the courts of law, *judging for the benefit of the subject*, have " held that they ought not to receive such a construction."

And in the interpretation of statutes more nearly connected with the subject in hand, there is an instance directly in point, to shew that it is not sufficient that the words of a subsequent statute *may amount* to a repeal of a former law, to induce the courts to hold a prior statute, enacted for the benefit of the subject, repealed. It seems to be agreed at present, that, by the common law, as it stood before the 1st of Edward VI., one witness was sufficient in the case of treason, as well as in other capital cases. This is the opinion of Serjeant Hawkins, and more clearly that of Mr. J. Foster.

Hawk. P.C. B. 2. c. 25. § 129.

Foster 233.

By 1st Edward VI. c. 12. and 5th & 6th Edward VI. c. 11., two witnesses are rendered necessary in all indictments or convictions for treason, petit treason, or misprision of treason; and by 1st & 2d Phil. & Mar. c. 10., " it is enacted, that all " trials after that statute to be had, awarded, or made for any " treason, shall be had and used *only according to the due or-* " *der and course of the common law.*" By the general terms of this act, strictly taken, it would appear as if the acts of Edward VI., introducing two witnesses in trials for treason, were repealed, as well as those statutes of Henry VIII., to some of which allusion has been made above, which trenched upon the rules established for the safety of the subject. But it is clear-

ly shewn by Mr. Justice Foster, that, notwithstanding the generality of the words, the act of Philip and Mary was never so interpreted. Lord Coke is of this opinion. Lord Hale, though he appears sometimes to have doubted it, yet seems finally to have been of this opinion also. The judges, in the case of the regicides, agreed that the law requires two witnesses in the case of treason; and in Lord Stafford's trial the same thing was agreed. From that time to the Revolution, this has been regarded as settled law, which, till the passing of 7th William III., could only be so under the said statutes of Edward VI. The ground on which the statute of Philip and Mary received this interpretation could be only this, that *the rule introduced by the acts of Edward III. were in favour of the subject, and could therefore not be held to be repealed but by express words.* Without doubt, the words of the statute of Philip and Mary were sufficient, if taken in their extent, to repeal the two statutes of Edward VI. In that instance, the advantages conferred on the subject in the mode of trial for the offence, were held not to be abrogated by general words, though in strictness liable to this interpretation. So, in the present instance, the prisoner humbly contends, that the benefits conferred in the mode of trial by so many statutes, cannot be held to be abrogated by the general words of the act on which this indictment is framed; words less subject to such an intrepretation than those of the act of Philip and Mary.

Coke, 3d Inst. 26, 27. 1 Hale, 306.

Kelyng's Rep. 9.

3 State Tr. 204.

But further, the prisoner humbly submits it as quite clear, that without the most express words, *it can never be understood that the legislature intended to render an offence a felony, which by law is a treason.* Indeed, this must appear to every lawyer nothing short of a contradiction in terms. And it is to be observed, that it is not here the question, whether the legislature intended merely that the particular sort of treason, which might be committed by administering some sorts of treasonable oaths, *should be* TRIED *in the same manner as felonies are tried*, and that the subject, in this case, should be deprived of the benefits of a trial as for treason. That this is not lightly to be inferred, the prisoner has already endeavoured to shew. But the demand made by the prosecutor is of a yet more extraordinary nature. He desires that your Lordships should hold, that by this act the legislature have declared *a treason to be a felony.* The words of the statute are, that the person administering a certain oath, shall be adjudged guilty of felony; and the proposition of the prosecutor is, that he shall be so adjudged, although, by the act of which he is accused, he is guilty of treason. The prisoner affirms, without fear of contradiction, that if that be the meaning of the act, it stands single in the statute-book. He ventures to affirm, without fear of contradiction, that there is not a pas-

sage in any writer on the law of England, in the doctrine of any judge, or the argument of any English lawyer, of which a record has been preserved, from which it may be inferred, that the possibility of any such enactment was ever contemplated. Of the course the legislature adopts, when it proposes to dispense with the mode of trial in treason, there are modern instances; but that this is not the course for that purpose, there is abundant authority to shew.

By the 3d Henry VII. c. 14., it is enacted, "That if any "servant, admitted to be the King's servant sworn, and his "name put to the chequer-roll of his household, &c. make "any confederacies, compassings, conspiracies, or imagina-"tions, with any person, or persons, to destroy or murder the "King, or any lord, or other person sworn to the King's coun-"sel, &c. the same offence be judged felony, and the mis-"doers to have judgment and execution, as felons attainted "ought to have by the common law." *Compassing and conspiring to destroy and murder the king*, is, without any doubt, high treason under the statute of Edward III.; and *by the words of the statute of Henry VII. it would appear that this treason was declared a felony*, which would be the more extraordinary, as it is not even deprived of the benefit of clergy. But to Lord Coke, who has an express chapter upon this statute, it never occurred that this interpretation could be put upon it. He regards it as only applicable to such sort of confederacy, compassing, &c. as, *being unaccompanied by the overt act required, would not amount to treason.* For he says, "To destroy or murder the King. By this act *it expressly* "*appeareth, by the judgment of the whole Parliament*, that be-"sides the confederacy, conspiracy, or imagination, there must "be some other overt act, or deed, tending thereunto, to make "it treason within the statute of 25th Edward III. *And*, "*therefore, the bare confederacy, compassing, conspiracy, or ima-"gination, by words only, is made felony by this act.* But if "the conspirators do provide any weapon, or other thing, to "accomplish their devilish intent, *this, and the like, is an overt* "*act to make it treason.*" So far from conceiving that a treason could be enacted into a felony, he holds the enacting an offence to be a felony, to be *a judgment of the whole Parliament*, that there are circumstances under which it might be committed without being guilty of treason, although the words are expressly such as are the very definition of the highest sort of treason.

Coke's 3d Inst. 38.

In like manner, the prisoner would say, that the act 52d of the King, declaring that the administering of an oath, purporting to bind to commit treason, shall be a felony, is a judgment of Parliament that it may be committed without

being guilty of treason. But, as Lord Coke goes on to say, if certain circumstances accompany the confederacies mentioned in the 3d of Henry VII, these are overt acts to make it treason, intimating that it can no longer be tried as a felony under that statute; so, the prisoner would say, that, if the oath be administered under certain circumstances, then such administering is treason, and the offence cannot be tried under the 52d of the King.

To the same purpose Lord Hale, observing on this statute of Henry VII, remarks, "that it makes conspiring the King's "death to be felony, *which it would not have done, if the bare "conspiracy without an overt act had been treason.*" The same author remarks, that "the statutes 1st & 2d Phil. and Mar. "c. 3., 1st Edw. VI. c. 12., 23d Eliz. c. 2., making several "offences felony, *have this wary clause*, THE SAME NOT BE-"ING TREASON BY STATUTE 25th Edward III.;" and he says, "*enacting an offence to be a felony is a great evidence that "it was not treason before*, AND A JUDGMENT OF PARLIA-"MENT IN POINT, FOR IT CANNOT BE THOUGHT THAT IT "WOULD MAKE THAT LESS THAN TREASON WHICH WAS "TREASON BY 25TH EDWARD III."

1 Hale 111. — 260, 261.

And Mr. J. Foster, in terms more explicit, says, "Lord "Chief-Justice Hale was of opinion, that bare words are not "an overt act of treason. Coke was of the same opinion. "Hale has treated the subject pretty much at large, and I "shall not repeat his argument, but I must say, *I think his "reasons founded on temporary acts, or acts since repealed, which "make speaking the words therein set forth felony, or misde-"meanor*, ARE UNANSWERABLE. *For, if these words*, seditious to the last degree, *had been deemed overt acts within the "statutes of treasons*, THE LEGISLATURE COULD NOT, WITH "ANY SORT OF CONSISTENCY, HAVE TREATED THEM AS "FELONY OR MISDEMEANOR." And he adds in a note, "The like use hath been made of temporary statutes, which "make words in certain cases treason. But I do not build "upon them. I RELY ON THOSE WHICH MAKE WORDS FE-"LONY OR MISDEMEANOR."

Foster, 200, 201.

The prisoner, therefore, takes it for granted on all the authorities, that so far is the enacting an offence to the felony which was understood to be treason, from being a declaration of the legislature, that although treason, it may be tried as felony, it is a judgment of Parliament that it was not treason before; and where the legislature, in enacting an offence to be felony, has employed words which might embrace the commission of it under circumstances which would make it treason, it is an established rule of law, that such enactment applies only to cases where the offence does not amount to treason. It is, therefore, only necessary for the prisoner to show, with regard to the offence mentioned in the act, that there are

cases in which its commission would not amount to treason, in order to relieve your Lordships from any difficulty you might feel yourselves under, if you were bound either to decide against the weight of authority, that has been produced, or else to hold as nugatory the first part of this enactment of these statutes. But there is no occasion for any such difficulty.

In the *first* place, the words, " any treason," are necessary in the statute, in order to embrace the case of an oath to commit *petit treason*, which, your Lordships know, is an aggravated species of murder, and which otherwise, in England, *would not have fallen under the words of the statute.* Whether it might, notwithstanding, have been held within its meaning, it is unnecessary to discuss. It is certain, that in all general pardons which have been passed for a century and a half, the exception of petit treason, *eo nomine*, has been constantly inserted with that of wilful murder; and such is now the usual wording of acts of Parliament. *Secondly*, There are not wanting cases of oaths to commit *high treason* to which it applies. Thus, an oath, or engagement to join in a conspiracy to obtain any public purpose by open force and violence, as to raise the rate of wages generally; to destroy all machinery, not merely in one particular place, or of one particular description; or to redress any public grievance; in short, to join in any of those acts of open violence and tumult, which are distinguished in law as a constructive levying of war against the King in his realm, *would be within the statute;* and the administering and taking such oath *would not amount to an overt act of treason under any existing law.* For the compassing to levy such a war as this, is, as your Lordships well know, *not treason:* and the compassing or conspiring to levy *any* war, unless it amount to an overt act of compassing the King's death, is only treasonable under the statute of the 36th of his present Majesty.

Foster's Civ. Law, 325.

In no view could this word treason have been omitted out of the statute consistently with the main object for which it was passed, namely, the putting down certain disturbances, threatening very serious consequences. As it was obvious that all *murderous* engagements would not be included without the insertion of the word *treason*, so it was easy to see that the projected disturbances might be of a nature amounting to a constructive levying of war, and that, without the insertion of the word treason, a difficulty might occur, since an engagement to commit this sort of treason would not fall under the description of an engagement to commit felony. Another reason may be supposed to have had its weight, namely, that the act 36th of the King, rendering the compassing to levy war for certain purposes therein set forth in itself an act of high

treason, is only a temporary statute, which expires with the life of his present Majesty, whereas this act of the 52d of the King is perpetual.

Two things only remain. To give your Lordships an example of the course which the legislature adopts, when its object really is that which the prosecutor would attribute to it in the present instance, and to shew, in very few words, that no such conclusion as he would draw can be fairly inferred from the last section of the act, on which he seems mainly to rely.

At the time of the detestable attack made on his Majesty in the year 1800, it was thought advisable to place direct attacks upon the King's person on a different footing from other acts of treason with regard to the mode of trial, and to assimilate them, in this respect, to the like murderous attempts on the person of a subject. That the actual murder of the King does not itself constitute treason, but can only be tried as an overt act of compassing his death, was, as your Lordships know, solemnly decided in the case of those who put to death King Charles I. It never occurred to any one, that it was possible to try these persons for *murder*. And by statute 9th Geo. I. c. 22., it is enacted, "that if any person "wilfully and maliciously shoot at any person, he shall be "adjudged guilty of felony, without benefit of clergy." But it was not thought, that by this act, *the shooting at the King could be prosecuted as such felony*, nor was it thought possible to enact the treason of attacking the King's life into a felony. Accordingly, the act 39th and 40th Geo. III. c. 93. was passed, reciting in the preamble, that "whereas it is expedi- "ent, in cases of *high treason, in compassing and imagining the* "*death of the King*, where the overt act alleged shall be the "assassination or killing the King, or any direct attack "against his life, &c. *the trial* for such offence should not be "different from trials for murder, or wilful and malicious "shooting;" it then enacts, "that the person shall be *indicted*, "*arraigned, tried, and attainted* in the same manner, and ac- "*cording to the same course and order of trial* in every respect, and "*upon the like evidence, as if such person or persons stood charged* "*with murder*." And so thoroughly aware was the legislature that treason could not be tried as felony, and that acts passed for the benefit of the subject could not be repealed by implication, that that act contains a special clause, enacting, "That none of the provisions contained in the several acts of "the 7th year of King William III. and the 7th of Queen "Anne respectively, touching trials in cases of treason, &c. "shall extend to any indictment of high treason, in compas-

Kelyng's Rep. 8.

" sing &c. where the overt act shall be such as aforesaid, but, " upon conviction, judgment shall nevertheless be given, and " execution done, as in other cases of high treason, any law, " statute, or usage to the contrary notwithstanding."

It is believed, that the act of the present session, for the better preservation of the Prince Regent's person, is of the same tenor.

The prisoner has now to shew, that the words in the last section of the act, relied on by the prosecutor to prove that an option is given of prosecuting treason as felony, not only authorise no such inference, but that such an inference would be attended with consequences the most preposterous, and the most dangerous.

It must be recollected, that this statute is, both by its title and preamble, to be considered as an extension of the act 37th of the King, which it was passed for the purpose of rendering more effectual. By this act, 37th Geo. III. c. 123., " the administering or taking any oath, purporting or " intending to bind the person taking the same to engage in " any mutinous or seditious purposes, or to disturb the pub- " lic peace, or to be of any association, society, or confede- " racy formed for any such purpose, or to obey the orders or " commands of any committee not lawfully constituted, or of " any leader or commander, or other person not having au- " thority by law for that purpose, or not to inform or give " evidence against any associate," &c. is declared felony, and punished by transportation for seven years. The last section of that act is in the same words with the last section of the act now under consideration. So that, by the same rule of construction, it must be maintained, that in passing the act 37th of the King, it was the intention of the legislature, that persons guilty of high treason might be tried for this felony, and be sentenced to transportation for seven years, and, being so tried, should be for ever quit from all question as to their treason. And if the words of that statute be attended to, and such be its construction, the offence might obviously amount to no less an act of treason than the enlisting in a regular body sworn to obey the orders of a leader or commander in open rebellion. The prisoner has already shewn, that the direct and general words in the *first section* of the act on which he is indicted, will not abrogate the rule of the common law. There is, therefore, to this effect, no difference between the two statutes. If the inference is to be drawn from the *last clause*, it is equally applicable to the 37th of the King as to the latter act of the 52d.

To engage in a mutinous or seditious purpose, may include a treasonable engagement; and to administer or take an oath, binding to any such engagement, may most easily be an overt act of treason. To disturb the public peace, may include treason; to become bound, or engage another, to be of any confederacy formed for such purpose, if the purpose be treasonable, which it may well be, may be an overt act of treason. To administer or take an oath to obey the commands of any body of men, not lawfully constituted, or of any leader or commander, not having authority by law, if such body or leader be engaged in any treasonable purpose, may be an overt act of treason, and in many, perhaps most of the instances, in which a leader and commander could be supposed appointed, is more likely to be an act of treason than otherwise. If to these considerations be added the last clause of the said act of the 37th of the King, declaring, "That any person, who shall be tried and acquitted, or convicted of any offence against this act, shall not be indicted, prosecuted, or tried again for the same offence or fact, as high treason, or misprision of high treason, and that nothing in this act contained shall be construed to extend to prevent any person guilty of any offence against this act, and who shall not be tried for the same as an offence against this act, from being tried for the same as high treason, or misprision of high treason, in such manner as if this act had never been made;" then the prosecutor has, according to *his* reasoning, complete evidence, that "it is quite clearly the meaning of this law, to make the administering or taking an oath, purporting in terms of the statute, triable according to the ordinary course of justice, (that is, as a felony,) whether it be treason or not;"—that is, that "it is quite clearly the meaning of the law," *to make high treason triable as a transportable felony;*—to give the power to every informer, perhaps an accomplice, of laying an information under this act, to the effect of obtaining the culprit to be indicted under it at the quarter-sessions, so that, although the offence should turn out to be truly an act of high treason, amounting to actual rebellion, and a conspiracy to take up arms, provided it be also an engagement to embark in any mutinous or seditious purpose, and it cannot well be otherwise, or to obey a body or leader, not having authority by law, he can only be convicted under the act, and transported for seven years.

Information, p. 18.

There is, as your Lordships know, in England, nothing to prevent any man from bringing another to justice for a public crime; and if it be the law, that it is no objection to an

indictment and trial under the statute, that the fact committed is high treason, then, on such information being given to the grand jury, they may lawfully indict one guilty of treason as for this felony; and if the treasonable matter be kept back from the knowledge of the grand jury, they have no choice but to indict him of the felony, and then, though it appear manifestly on the trial that the crime was high treason of the most dangerous nature, there is no legal remedy; but the culprit must escape with a punishment *absolutely ludicrous* when compared to *the extent of his guilt.* Is it not obvious, that if this were the intention of the legislature, the title of the statute has been mistaken, and that it ought to have been entitled, "an act for abolishing the pains and "penalties of high treason in certain cases, and substituting "the punishment of transportation for seven years in lieu "thereof?" Nor under the last act, the 52d of the King, is the conclusion much less absurd; for though the *administering* a treasonable oath renders the person subject to a capital punishment, the *taking* it is only a transportable offence; so that for an oath taken to kill the King, though a weapon were provided for the purpose, and other steps taken to accomplish it, a man might yet be only liable to transportation; and this, it is gravely supposed, was in the view of the legislature in passing this act.

We are here, in a question not wholly without ambiguity, endeavouring to ascertain the intention of the legislature in passing an act of Parliament. The act creates two descriptions of felony, one without benefit of clergy and capital, the other within benefit of clergy and transportable. The legislature must therefore have been aware, not only that acts of high treason might be tried under the statute *as a capital felony,* but that acts of the same nature might be tried *as a transportable felony.* For the act says, any person *taking* an oath to commit treason, shall be transported for life, or for such term as the Court shall adjudge. And if the legislature meant, in one case, that high treason might be punished *as a capital felony,* it is equally clear, that it meant in the other that it might be punished *as a transportable felony.* And in passing the 37th of the King, it meant, that high treason should be punished *by transportation for seven years only.* The prisoner will not say, that it is difficult to suppose any thing more unlikely; but he affirms, that nothing can be supposed more impossible. To ascribe this intention to the legislature is an utter absurdity. He possesses no means of illustrating what appears so plain and undeniable, to which he cannot even imagine an answer, and which, if it required additional support, is amply confirmed by the uniform doctrine of all writers of authority—Coke,

Hale, Foster—*who agree that it is not to be imputed to the legislature, that it ever intended, by any statute, to enact treason into felony.* If the words, therefore, of this last clause of these two statutes should remain utterly nugatory and unintelligible to the end of the world, this would not involve half the difficulty, or a tenth part of the absurdity, of imputing to the legislature an intention such as has been supposed.

Instead, therefore, of assuming such a proposition as this, the prisoner will rather endeavour to ascertain what meaning this clause can have, consistently with the plain rules of law and common sense. And in so doing, he is happy to think there is no extraordinary difficulty.

The clause consists of two parts. The prisoner will beg leave to begin with the last. It is in these terms, "That "nothing in this act contained, shall be construed to extend "to prohibit any person guilty of any offence against this act, "and who shall not be tried for the same as an offence against "this act, from being tried for the same as high treason, or "misprision of high treason, in such manner as if this act had "not been made."

Now, what is this but a clause of the nature of that *wary clause*, which Lord Hale remarks in the statutes of Philip and Mary, Edward, and Elizabeth, making several offences felony, "*the same not being treason by statute 25th Edward "III.*" The legislature was aware, that the enacting these offences into felony was a judgment of Parliament that they were not treason; and therefore, to avoid the risk of any such interpretation, where the offences were treason, this clause was introduced.

In the same manner, the 52d of the King declares, that nothing therein contained shall be construed to prohibit any offence against this act from being tried as high treason; lest it should be argued, that the general terms of the statute were a declaration of Parliament, that such offence was no longer to be considered a treason, but a felony. The general terms of the enacting clause, that the administering or taking *any oath binding to commit any treason*, shall be deemed felony, would take in all the cases of administering or taking such oaths, though such administering or taking should amount to treason. It is true, that according to just rules of construction, and agreeably to the precedents and principles which have been mentioned, it ought not to be so construed. But it was justly thought proper not to leave this to construction, but to declare, by this express clause, that it was not intended that the statute should apply to cases where the offence actually amounted to high treason, but that these should be tried in the same manner as before. And, as Judge Foster

Foster, c. 30. § 224. very justly remarks, "though it is a good general rule, *that* "*the Parliament doth nothing in vain*, yet this is very well "known not to be universally true. For many valuable pur- "poses, which wisdom, and a just concern for the public wel- "fare, will suggest, may be answered by an express provision, "not in itself of absolute indispensable necessity; sometimes "for removing doubts, where different opinions have been en- "tertained, and at other times out of abundant caution, for "obviating doubts which possibly may arise."

But the words, "who shall not be tried for the same as an "offence against this act," are supposed to allude to this alternative power, which the act must therefore be held to have created. This alludes to, and is connected with, the former part of the clause, and will be best understood by examining what the meaning of this former part is.

It is in these words: "Provided also, and it is hereby de- "clared, that any person who shall be tried and acquitted, or "convicted of any offence against this act, shall not be liable "to be indicted, prosecuted, or tried again for the same of- "fence or fact as high treason, or misprision of high treason."

The prisoner readily admits, that to persons not accustomed to questions of legal construction, it may at first sight appear as if the legislature had contemplated the possibility of trying the same offence either as high treason or felony, at the pleasure of the prosecutor, or the indictors, viz. the grand jury. But it is quite obvious, that without any supposition of this sort, it must have been foreseen, that cases might readily occur where the facts might approach very close to treason, and where it might be doubtful whether to proceed for treason, or for the felony under the statute. If the latter course were adopted, and it came out in evidence to be treason, the prisoner, though acquitted, was yet subject, according to the law of England, to be tried over again for the same fact, under the denomination of the higher crime. It was this hardship the legislature meant to prevent. It meant to extend to the subject in England by statute in this case, the benefit to which he is entitled in Scotland by the common law in all cases, that he shall not be tried on different accusations, and under different denominations of guilt, more than once for the same fact. There is nothing either so anomalous, or so extraordinary, in a provision by the legislature to remedy this hardship, when it was creating new offences, to be punished by the latter statute with great severity, that we should rather have recourse to the extravagant supposition suggested by the prosecutor, to account for the insertion of these words.

But it may be said that this reasoning relates only to a case of *acquittal*; and it may be asked, To what purpose is it

declared, that a person *convicted* of an offence against this act, shall not be tried again for the same offence or fact as high treason, if, the fact amounting to high treason, he could not be legally convicted of that offence or fact under this act? The solution of this difficulty, if it be one, is not very intricate. In the *first* place, The prisoner is not aware that the legislature has ever declared, that where an acquittal on one indictment shall be a bar to another, a conviction shall not be equally so; and it would seem a singular hardship if it were otherwise. In the *second* place, It was obvious, that circumstances might come out afterwards, shewing the facts committed to have amounted to treason, which might not appear at the trial. And the legislature thought it would be too rigorous a proceeding, on account of after discoveries, which, though they might vary its legal complexion, might not vary the facts of the case, again to put the offender on his trial, which might be by the common law. For a conviction or acquittal on a charge of felony could not be pleaded in bar of a charge of high treason by the common law.

In the *third* place, An offence not amounting to treason when committed, or tried, may become treason by a subsequent event, and the possibility of this was more obvious in those offences which were in the particular view of the legislature in passing these acts. The species of treason, to which the engagements contemplated were the most likely to lead, was evidently the levying of war. Now, if the war proposed to be levied, were not directly against the King's person or government, or coming under the 36th of the King, but only what is termed a constructive levying of war against the King, then the bare conspiracy would be no treason, unless the rising were effected, or the war levied. But "in that case, the con- Foster 213.
"spirators, as well as the actors, will be all equally guilty; for
"in high treasons of all kinds the *participes criminis* are princi-
"pals." "And if divers conspire to levy war, and some of them 1 Hale 133.
"actually levy it, this is high treason in all the conspirators; be-
"cause in treason all are principals, and here is a war levied."
"So it was declared at the arraignment of Sir Nicholas Throg-
"morton, by the opinions of the Judges, that if two or more
"conspire to commit treason, as in levying war, and any of
"them afterwards put it in execution, that is treason in all,
"and this by the common law, before the declaration was
"made in 25th Edw. III." Thus, if one were indicted under the 37th of the King, for administering or taking an oath, binding to be of an association for any mutinous or seditious purpose, or to obey the orders or commands of any committee or body of men not lawfully constituted, or of any leader or commander not having authority by law, there being at the

time of his arraignment no war levied, he could not be tried for treason. But being either acquitted or convicted under this indictment, if afterwards the association or committee, or body of men, or leader, or commander with whom he had so conspired, should actually proceed to effect the rising contemplated, such rising amounting to a levying of war, he would be thereby rendered *ex post facto* guilty of treason; and, but for this clause in the act, might be tried for treason accordingly; nor could he plead in bar, his former acquittal or conviction of the felony.

These considerations rendered this clause indispensable. So to interpret the intention of the legislature infers no absurdity, but, on the contrary, is for the advancement of justice, and for the freedom of the subject from vexatious and oppressive prosecutions. The only inconvenience that can be supposed to arise from it is this, that if an offender be tried under either of these acts, and it come out on evidence that his offence amounts to high treason, he must be acquitted under the general rule of law, that treason cannot be tried as felony. But this by no means follows; for if it be the intention of the legislature that treason shall not be tried as a felony under this act, he cannot be lawfully put upon his trial for this felony, if his offence amounts to treason. If the facts so appear to the magistrate, he ought to be committed for treason, and not for felony. If they so appear to the grand jury, he cannot be lawfully indicted of the felony, and the Judge will not suffer him to be put on his trial on such indictment. If it so appear to your Lordships, you will not pronounce an interlocutor of relevancy. If in England, "through mistake on the part "of the prosecutor, or through the ignorance or inattention of "the officer, a bill were preferred as for this felony, and it "should come out on evidence that the offence was high trea- "son, the judge would not think it by any means advisable "to direct the jury to give a verdict of acquittal; for a per- "son charged with a crime of so heinous a nature, ought not "to have the chance given him by the Court, of availing him- "self of a plea of *autrefoits acquit*."—"In such a case," in the words of Mr. Justice Foster, "he would make no sort of "difficulty of discharging the jury of that indictment, and or- "dering a fresh indictment for the treason. In this method, "the prisoner would have the advantage of his peremptory "challenges, and the public justice would not suffer."

Foster, Crown Law, 328.

That the Court has authority, agreeably to the law and practice in England, to discharge the jury after the prisoner has pleaded, and evidence given, where the purposes of justice require it, has, from before the time of Lord Hale, been admitted by the best authorities.

1 Hale 35. 522, 557. 2 Hale, 295. Kelyng's Rep. 26.47. 52.

The case of a trial on this statute, where the offence amounts to high treason, is precisely in point with that put in by Mr. Justice Foster, of a trial for murder where the offence amounts to petit treason. For in that case it is laid down by all the authorities, that an acquittal upon an indictment of murder is a good bar to an indictment of petit treason, in the same way as an acquittal of this felony created by the statutes of the King, would be a good plea in bar of an indictment of high treason for the same offence, though neither in the case of petit treason, even in Judge Foster's opinion, ought a conviction to follow, nor by the general rule of law, in an indictment under this statute, as the prisoner trusts he has shown, can a conviction follow, if the offence amount to high treason.

Foster, 38, 39. Foster's C. L. pp. 30. et seq. Ib. 328. Leach's case in C. L. Case 233. Ibid. Ca. 257. Foster, 329, 2 Hale, 246, 252. 3 Coke Inst. 213.

According to the construction which the prosecutor would put on the intention of the legislature in passing the statute on which he has laid the present indictment, he would impute to the legislature this inconceivable injustice and absurdity —That on the one hand the highest and most dangerous species of treason, involving a meditated attack on the life of the Sovereign, sanctioned by the solemnity of oaths, and extending, as is alleged in this case, to a conspiracy of hundreds or thousands of persons, threatening, as is here also alleged, "to "effect the subversion of the established government, laws, and "constitution of this kingdom," by means which must involve the whole nation in bloodshed and in open war, may be tried as a felony, punishable only with transportation; and the indictment being once preferred, whether by a grand jury in England, or the public prosecutor in Scotland, no remedy remains, but the offenders must be for ever discharged by this means from all further consequences of their guilt. And on the other hand, by the contrivance of the officers of the Crown, the subjects of this country may be brought to trial, and placed in hazard of their lives on a state prosecution—with the whole weight and influence of Government to oppress them—the overheated zeal of its officers excited, perhaps, their interest and reputation at stake on the issue—as well as the passions of the factious, the terrors of the timid, the just indignation of the well-affected against crimes involving the common safety, overpowering the natural disposition to clemency and deliberation,—all combining to deprive the accused of the security which in ordinary cases they possess, for a fair and impartial trial;—while they are at the same time stripped of those safeguards, which it has been the ceaseless endeavour of the law of England, from the most ancient times, even in the midst of tyranny and disorder, to provide for the protection of the subject against that oppression, and that danger, to which it has

always felt and acknowledged him to be in these circumstances exposed. The prisoner will only add, that to put such a construction upon these acts of Parliament, would not be to expound the laws, but to libel those who made them. At your Lordships' hands, he is certain there is no danger of their receiving such a construction, equally disposed as you feel, at once to protect the subject from oppression, and to vindicate the necessary justice of the country.

In respect whereof, &c.

J. P. GRANT.

THE

TRIAL

OF

ANDREW M'KINLEY,

FOR

ADMINISTERING UNLAWFUL OATHS.

Proceedings on the 18th July, 1817.

PRESENT,

The Right Honourable DAVID BOYLE, *Lord Justice Clerk.*

LORD HERMAND.	LORD PITMILLY.
LORD GILLIES.	LORD RESTON.

Counsel for the CROWN.

The Right Honourable ALEXANDER MACONOCHIE of Meadowbank, *His Majesty's Advocate.*

JAMES WEDDERBURN, Esq. *Solicitor-General.*

HENRY HOME DRUMMOND, Esq. *Advocate-Depute.*

Counsel for the PANNEL.

JOHN CLERK, Esq.	J. P. GRANT, Esq.
GEORGE CRANSTOUN, Esq.	JAMES MONCRIEFF, Esq.
THOMAS THOMSON, Esq.	J. A. MURRAY, Esq.; and
FRANCIS JEFFREY, Esq.	HENRY COCKBURN, Esq.

(The pannel was placed at the bar.)

LORD JUSTICE-CLERK.—Your Lordships will recollect, that, at a former diet, objections were stated at great length to the relevancy of the indictment against the pannel, which objections were considered by you as of such an important de-

scription, that you ordered them to be embodied in informations. The informations are now before you, and your Lordships will now give your opinions upon them.

Mr. Clerk.—I attend your Lordships for the pannel, and, I trust, I may be permitted to say a few words upon the indictment, in addition to what is stated in the informations; and I shall not detain you long.

Lord Advocate.—The gentlemen have given in two informations when the order was for one; and your Lordships will judge whether we are now to go into a new pleading.

Mr. Clerk.—You know, that before the indictment was ready, it was concerted there should be informations. That appointment was renewed after the indictment was prepared, and after hearing counsel; but it was before the last indictment was prepared that it was fixed there should be informations; and your Lordships have not yet given any opinion at all upon the subject of this indictment.—The informations were ordered upon the understanding, that the indictment would be nearly the same as the former one, only correcting the slovenly statement of the former. It would be strange if your Lordships were not to hear counsel. I shall not detain you long, but shall only call your attention to some passages that had escaped the acuteness of my learned friend Mr. Moncrieff. As to the other argument by Mr Grant, I do not mean to touch upon it at all.

Lord Justice-Clerk.—It is necessary to attend to the shape in which the case comes before us. Mr. Clerk is correct in point of fact in his statement; but I distinctly intimated, when a new indictment was served on the pannel, that no *viva voce* additional arguments would be looked for by the Court from the bar, but that the counsel for the prisoner should embody their whole arguments in the informations—when we would consider them and give our opinions. I considered it fixed, that no farther *viva voce* discussions were to take place in this case. There was a discussion as to the time to be given for preparing the informations, and we listened to the entreaty for farther time to the gentleman who was to draw the information for the pannel. Mr. Cockburn was the counsel who made an application on the subject. We gave the fullest and most ample opportunity for preparation to the pannel's counsel; and not only is there an able argument for the pannel by Mr. Moncrieff, but one also by Mr.

Grant. I have fully considered the informations, and I presume your Lordships are all prepared to give your opinions upon them.

Lord Hermand.—I am of the same opinion with your Lordship, and I beg leave to make an addition to your statement; that in this case the information for the Crown was drawn first. It was put into the hands of the ablest band of counsel that could appear for any pannel, and I do not see for what reason we should reverse the usual course of proceeding, and again take a day or two to consider what Mr. Clerk or others may bring forward.

Lord Gillies.—Any thing additional should have been stated at an earlier period.

Lord Pitmilly was of the same opinion.

Lord Hermand.—This case has been truly stated to be a case of great importance. It is of the last importance to the pannel at the bar, for it is a question of capital punishment; which, whatever may be done in another quarter, we have no power to mitigate. But it is of greater consequence in another view: it is of infinite consequence to every one who now hears me, every one who has a due regard for the excellent constitution under which we have the happiness to live.

The question, however, is extremely simple in itself; and I cannot say I am much afraid of the hint of impeachment thrown out, if we refuse to give effect to what is called a judgment of Parliament in the days of a former Sovereign. I sit here, in the reign of George the third, to give my opinion how far an indictment is well laid, upon the act 52. Geo. III. cap. 104., an act called for by the circumstances of the times; and to which, every man having a due sense of the constitution, should wish to give fair and full effect. 2d Inst. p. 83.

It is upon that statute, therefore, I have formed my opinion; and to it I beg leave to call the attention of the Court. It enacts, "That every person who shall, in any "manner or form whatsoever, administer, or cause to be "administered, or be aiding or assisting at the adminis-"tering, of any oath or engagement, purporting or intend-"ing to bind the person taking the same to commit any "treason or murder, or any felony punishable by law with "death, shall, on conviction thereof by due course of law, "be adjudged guilty of felony, and suffer death as a felon,

"without benefit of clergy." Yet in the face of this clear enactment, we are gravely told, that, by some rule of the submersion of one crime into another, said to be found in English law books, of which I pretend to know little, it is not in our power, without violating our duty, to pronounce judgment in this case as in a felony, though we are commanded to do so by a solemn act of the legislature. The term *felony* occurs in almost every clause of the statute, particularly that which I have just now read. And the minor proposition, duly following out the words of the statute, states that, "You the said Andrew M'Kin-"ley are guilty of the said crimes, or of one or more of "them, actor, or art and part: In so far as you the said "Andrew M'Kinley did, at secret meetings, and on other "occasions, at Glasgow, and in the vicinity thereof, in the "course of the months of November and December 1816, "and January and February 1817, wickedly, maliciously, "and feloniously administer, or cause to be administered, "or did aid or assist at the administering, to a great num-"ber of persons, to the amount of several hundreds, an "oath or engagement, or an engagement or obligation in "the nature of an oath, purporting or intending to bind "the persons taking the same to commit treason, by ob-"taining annual Parliaments and universal suffrage by "physical strength or force, and thereby effecting the "subversion of the established government, laws, and "constitution of this kingdom, by unlawful and violent "means." It is inconceivable to me, that a statement more in terms of the act of Parliament could be made.

After reciting the oath, the indictment charges the administering it, at various *secret* meetings, to sundry persons, many of them secured, and some of whom have absconded. The material question therefore turns upon the oath, which is here recited:

"In awful presence of God, I, A. B. do voluntarily "swear, that I will persevere in my endeavouring to form "a brotherhood of affection amongst Britons of every de-"scription, who are considered worthy of confidence; and "that I will persevere in my endeavours to obtain for all "the people in Great Britain and Ireland, not disqualified "by crimes or insanity, the elective franchise, at the age "of twenty-one, with free and equal representation, and "annual Parliaments, and that I will support the same to "the utmost of my power, either by moral or physical "strength (or force), as the case may require: And I do "further swear, that neither hopes, fears, rewards, or pu-

" nishments, shall induce me to inform, or give evidence " against any member or members, collectively or indivi- " dually, for any act or expression done, or made in, or " out, in this or similar societies, under the punishment of " death, to be inflicted on me by any member or members " of such societies; so help me God, and keep me sted- " fast." I think this is the blackest oath I ever read. I think it bears treason and blasphemy on the face of it. It shocks me to see the name of God used for such purposes. With that name this strange oath begins and ends.

Is it, however, an oath under the statute? And with every respect for the ability displayed in contesting it, I have no doubt that it is; for it did purport, or intend to bind the persons taking it, to commit treason, murder, or other felony punishable with death. *A brotherhood* was to be formed of persons worthy of confidence, a *secret* brotherhood, for purposes subversive of the constitution. What more so than universal suffrage, or annual elections to Parliament? I take the words of my learned friends on this subject. One gentleman said the plan was productive of anarchy *or* despotism. I took down this from Mr Cranstoun. Mr. Clerk said the oath was wicked enough, indicating a very bad intention. I find the very same proposition stated by Mr. Moncrieff. I agree with them in this; and it amuses me to see that the gentleman who drew the one information, does not say a word upon the other. On the contrary, Mr. Clerk, who stood up a little ago, said he would take no notice of it whatever. Nay, in the information to which I referred, there is a passage which I do not understand, and which I shall therefore read, that it may be explained in conformity to the pannel's argument, if it admit of such explanation. " It may be admitted, that, 1st Inf. p. 73.
" without reference to some other objects, this oath was
" in a high degree improper, that it was highly criminal;
" that it was of an extremely dangerous tendency; that it
" was the duty of the public prosecutor to take notice of
" it, if the facts were true; and that it might with the ut-
" most propriety have been made the subject of an indict-
" ment. Supposing all this, the question remains, whe-
" ther it is an oath binding the party *to commit a treason?*
" Nothing, therefore, can be more irrelevant or inconclu-
" sive, than to state circumstances in the oath which indi-
" cate improper or criminal views. They may be very
" relevant to shew *such* intentions; but what your Lord-
" ships are bound to determine is, whether the oath pur-
" ports to bind the party to commit treason?"

It appears to me, that, with the utmost propriety the oath has been made the subject of indictment; and I cannot characterise it more strongly than is done in this passage. Nay, more, "The prosecutor may state, and those "who argue the case of the informant will agree with "him, that nothing more unconstitutional, nothing more "absurd, nothing more mischievous, nothing more neces-"sarily leading to despotism, and to the destruction of the "liberties of the country, could be suggested, than this "proposal of universal suffrage and annual Parliaments." Better language than I could have used; but it expresses the very feeling of my heart, and the sentiments of every one who has ever turned his attention to such a subject as that unfortunately now before the Court.

1st Inf. p. 75.

We were told that lawful means might be employed to accomplish all these objects. There is a good deal of inconsistency in this; and, in a question of relevancy, such lawful means are not to be implied. They are not to be implied in trying the relevancy of this indictment, though they may be the subject of after proof.

The question recurs, If there be treason in all this? or rather does the oath purport, or intend to bind to the commission of treason, murder, or other felony punishable with death? Now, laying aside the other crimes specified, if the measure contemplated be subversive of the constitution, it is treason against the state. And though the King's name be employed by lawyers, as compassing the *King's* death, levying war against the *King*, it is as the representative of the state, the preservation of which is the great object.

This is well explained, in a passage from one of the first lawyers and judges that England ever saw, quoted in the information for the Crown

P. 10. "In every insurrection, which, in judgment of law, is "intended against the person of the King, be it to de-"throne or imprison him, or to oblige him to alter his "measures of government, or to remove evil counsellors "from about him, these risings all amount to levying war "within the statute, whether attended with the pomp and "circumstances of open war or not. And any conspiracy "to levy war for these purposes, though not treason within "the clause of levying war, is yet an overt act within the "other clause of compassing the King's death. For these "purposes cannot be effected by numbers and open force, "without manifest danger to his person."

And, in another passage, "Insurrections likewise for "redressing national grievances, or for the expulsion of

" foreigners in general, or indeed any single native, living " here under the protection of the King, or for the refor- " mation of real or imaginary evils *of a public nature, and* " *in which the insurgents have no special interest*; risings to " effect these ends, by force and numbers, are, by con- " struction of law, within the clause of levying war, for " they are levelled at the King's crown and royal dignity." That is, I conceive, the law upon this subject; and, though I speak with the highest respect of the great man (Hale), in one part of whose works there is a passage from which this learned judge (Foster) differs, the quotations which I have read express the true law of the case, so far as I can presume to understand it. Indeed, so unanswerable is this, that the counsel for the pannel admits it, and adduces the authority of Sir Matthew Hale in these words:

" It is obvious that no other treason can be meant than 2d Inf. p. " that of levying war against the King. It may involve 85. " the compassing and imagining the death of the King, " because the levying of war against the King may well " be an overt act of such compassing and imagining. For " your Lordships know that it is laid down by Lord Hale " (1. Hale, 122), that 'an assembly to levy war against " the King, either to depose, or restrain, or enforce him " to any act, or to come to his presence to remove his " counsellors or ministers, or to fight against the King's " lieutenant, or military commissionate officers, is an overt " act, proving the compassing the death of the King; for " such a war is directed against the very person of the " King, and he that designs to fight against the King, " cannot but know but that at least it must hazard his " life.' And in Sir John Freind's case, who was convict- 4. State " ed of high treason in compassing and conspiring the Trials, 625, " death of the King, Lord Chief Justice Holt lays down 626. " the law, that, 'If there be only a conspiracy to levy " war, it is not treason; but if the design and conspiracy " be either to kill the King, or depose him, or imprison " him, or put any force or restraint upon him, and the " way and method of effecting of these is by levying a war, " then the consultation and conspiracy to levy a war for " that purpose is high treason, though no war be levied; " for such consultation and conspiracy is an overt act, " proving the compassing the death of the King.'"

In the other information for the pannel, we are told, that the kind of treason is not specified in the indictment; but here, another of his learned counsel, tells us that it *is*

specified. He says, it can be nothing else than levying war against the King. And, in another passage, still more favourable to the indictment, "But to effect this 2d Inf. p. 85. "subversion by unlawful and violent means, through the "obtaining annual parliaments and universal suffrage by "physical force or strength, if they are words sufficiently "certain and precise to amount to a legal allegation of "any sort of treason, can mean nothing else than a levying of war, in order, by force and constraint, to compel "the King to change his measures or counsels, or, at any "rate, in order to put force or constraint upon both "houses or either house of Parliament." The word *subversion* was quarrelled with; but it is cured here, "since "annual parliaments and universal suffrage cannot be obtained but by an act passed by the two houses and by "the King, and if this passing be obtained by violent "means, which violence amounts to treasonable violence, "it can be no other than the putting such force or constraint either upon his Majesty, or upon one or other "house of Parliament, as is above mentioned."

When I read this, I looked to the title of the paper. I took it to have come from the counsel for the crown,—for I cannot conceive a stronger argument they could have urged. Figure then the effect of this universal suffrage and these annual parliaments, *i. e.* annual *elections*, not annual *Sessions* of Parliament. The life of the King, of every other good man, and, among them, I regret to say it, the lives of the pannel's zealous defenders, would be in the situation of republican France. The lantern and the guillotine would be the order of the day; and my learned friends would probably go the first. Every revolution begins with the lowest of the people; and experience shows, that those whom they deemed their friends are the first to be sacrificed. It is absurd, therefore, to suppose, that legal means can be used for such deplorable ends. Bad intention is inherent in the oath, constituting a formed plan to subvert the constitution, which only would want an overt act to convert it into treason.

In the present deliberation, it is essential to remark, that there is no charge of treason in the indictment, a circumstance which cuts up the pannel's argument by the root. The charge is *not* a charge of treason. The indictment mentions treason indeed, but it does not say that treason has been committed. It has *not* been committed; and, under the providence of God, may never be. Yet we are told that the indictment is irrelevant, because it does not

mention what species of treason the parties to the oath had in their minds. The charge is of a quite different nature. It is, that the pannel administered an oath, purporting to bind to the commission of treason. By what means was that object to be attained? The oath removes every doubt, "That I will support the same to the utmost "of my power, either by moral or physical strength, as "the case may require,"—in the judgment, no doubt, of the brotherhood supposed to have been already established.

These words require no commentary. Moral strength consists in argument; physical strength is strength of arms; and these are to be employed as the case may require—the necessity being to be determined by the framers of the oath, and the brotherhood which it mentions. All this is under the dreadful sanction, "And I do further "swear, that neither hopes, fears, rewards, or punish- "ments, shall induce me to inform on, or give evidence "against, any member or members, collectively or indivi- "dually, for any act or expression done or made, in or "out, in this or similar societies, *under the punishment of* "*death*, to be inflicted on me by any member or members "of such societies. *So help me God*, and keep me sted- "fast." I think that the indictment need not have been confined to the charge of an oath binding to commit treason. It might have been also stated that this was an engagement binding to commit murder.

From the first I thought this a simple case; and, after all I have heard and read upon the subject, I still consider it in that light. It may not be improper, however, to say a few words upon the arguments of the pannel in his two informations.

It is said, and seems to be the great argument in the first, that this indictment is vague, as not specifying any particular treason; and we have a long quotation from Mr. Hume, to shew, what was never disputed, that specification is necessary in every criminal charge. But that is nothing to the present question. The charge is not a charge of treason, but of administering an oath which purports to bind to commit treason. It is not libelled that treason was committed; and it is impossible that the species of what never existed could be stated in the indictment. The oath itself is sufficiently special, bearing an obligation to bring about universal suffrage and annual parliaments, either by moral or physical strength, as the case may require.

Reference is made to the case of Kendal. In that case Sir James Montgomery stood committed on a charge of treason; and it was, therefore, by mere inaccuracy, that the public prosecutor did not specify what he knew; he had only to look at the bill found by the grand jury to see the species of treason charged.

It is said, that to specify the purport of the oath is not sufficient. It might not be sufficient in the case of incendiary letters and other instances, but here the objection is in the face of the act of Parliament, which enacts, that it shall be sufficient to set forth the purport of such oath or engagement, or some material part thereof.

A question was put, What is the antecedent to the words, "the same" in this oath? It is neither elegant, nor classical, nor correct; but the antecedent may be *endeavours* or it may be annual parliaments and universal suffrage: in either view, though clumsily expressed, the meaning is sufficiently clear.

The case was figured, that the oath had been, "to the "utmost of my power," without addition; which words imply *every* power. Here, however, there would be room for construction, and that which was favourable for the pannel might have been adopted. In the present case, the oath is too clear to admit it. But, it is obvious, that they were to employ every sort of force. Where there is a possibility of a favourable construction for the pannel, it ever will receive effect from me; but the words of the oath exclude that construction. I see a clear obligation to employ physical strength to bring about these detestable ends.

The supplementary information contains a new idea contradictory to the statement in the first. "The prison-"er has next to submit to the Court a view of the ques-"tion, totally different from those he has already offered; "and, in arguing which, he is to proceed on the assump-"tion, that those views which he has already stated are erro-"neous. For the purpose of this argument he is to as-"sume, that the oath does, in its terms, necessarily, and "by due construction, purport and intend to bind the per-"sons taking the same to commit treason; and that the "specific treason, to the commission of which it did pur-"port and intend to bind, is sufficiently set forth in this "indictment." I cordially agree with the proposition, "That the oath does in its terms necessarily, and by due "construction, purport and intend to bind the persons "taking the same to commit treason; and that the speci-

"fic treason, to the commission of which it did purport "and intend to bind, is sufficiently set forth in this indict- "ment." But what I desiderate is, how any thing favourable to the unhappy man at the bar can be elicited from this contradiction of his former argument. Both propositions cannot be true, but both may be *false*.

The first information states the indictment as faulty, as not charging the oath as binding to any particular treason, or to any treason at all. To this I have already alluded. The second information admits, that the oath does purport and intend to bind to the commission of treason; and the argument is, that because it binds to commit treason, it cannot be tried as a felony, though the act expressly makes it triable as such.

Here it is necessary to attend to the difference between the law of England, so far as I understand it, and the law of Scotland; and in the former there may be reason why felony should merge in treason. For 1. Crimes are there, in general, tried at the instance of private prosecutors, who, from corruption or from lenity, may be induced to skreen the greater, by bringing the trial for the lesser offence. 2. Even after going to a jury, a new trial is competent in England.

The law of Scotland differs in both these important particulars. 1. Trials here proceed at the instance of a public prosecutor, placed far above the influence of such a motive. 2. After going to a jury, the pannel cannot be subjected to a second trial.

But it is unnecessary to go into this deduction. The act of Parliament is the rule; and upon an oath binding to commit treason, or purporting to bind to commit treason, it inflicts the punishment of felony. And the following clause is highly material in the argument: "Pro- "vided also, and it is hereby declared, That any person "who shall be tried and acquitted, or convicted of any of- "fence against this act, shall not be liable to be indicted, "prosecuted, or tried again for the same offence or fact, "as high treason or misprision of high treason; and that "nothing in this act contained, shall be construed to ex- "tend to prohibit any person guilty of any offence against "this act, and who shall not be tried for the same as an "offence against this act, from being tried for the same "as high treason, or misprision of high treason, in such "manner as if this act had not been made." This necessarily implies, that the same act may be treason or felony, and tried under either denomination. And in case of ac-

quittal on a trial under this act, no trial for treason can afterwards take place: And if there be no trial under this act, then trial for treason may proceed.

2d Inf. p. 112. On this point the counsel for the panuel was much at a loss. "We are here, in a question not wholly without "ambiguity, endeavouring to ascertain the intention of "the legislature in passing an act of Parliament. The "act creates two descriptions of felony; one without bene- "fit of clergy, and capital; the other within benefit of "clergy, and transportable. The legislature must there- "fore have been aware, not only that acts of high treason "might be tried under the statute *as a capital felony*, but "that acts of the same nature might be tried as a trans- "portable felony."

p. 114. And in another passage, "The prisoner readily admits, "that to persons not accustomed to questions of legal "construction, it may at first sight appear, as if the le- "gislature had contemplated the possibility of trying the "same offence, either as high treason or felony, at the "pleasure of the prosecutor or the indictors, viz. the grand "jury." Of that possibility we have only to read the act of Parliament to have an absolute certainty.

It is not however upon critical niceties, but upon the plain common sense construction of the acts of the legislature, that Judges are entitled and bound to proceed. Indeed, much of the argument, however proper in the House of Commons, though even of that doubts may be entertained, comes in an irregular shape before this Court, who must apply the statute that has actually passed, without entering into speculations as to the propriety of the enactment itself. At the same time, I feel it incumbent upon me to declare, that in my apprehension, called for by the situation of the times, consummate wisdom and enlightened humanity are the genuine characteristics of the statute.

Hale's H. P. C. vol. 2. p. 193. Having said so much, I cannot conclude better than in the words of a great and excellent man: "In favour of "life, great strictnesses have been in all times required in "points of indictments; and the truth is, that it is grown "to be a blemish and inconveniency in the law and the "administration thereof. More offenders escape by the "over easy ear given to exceptions in indictments, than "by their own innocence; and many times gross mur- "ders, burglaries, robberies, and other heinous and crying "offences, escape by these unseemly niceties, to the re- "proach of the law, to the shame of the government, and

" to the encouragement of villany, and to the dishonour " of God. And it were very fit that, by some law, this " overgrown curiosity and nicety were reformed, which is " now become the disease of the law; and will, I fear, in " time grow mortal, without some timely remedy." The editor adds, in a note: " This advice of our author would, " if complied with, be of excellent use: for it would not " only prevent the guilty from escaping, but would likewise be a guard to innocence; for thereby would be removed the only pretence upon which counsel is denied " the prisoner in cases of felony; for if no exceptions were " to be allowed but what went to the merits, there would " then be no reason to deny that assistance, in cases where " life is concerned, which yet is allowed in every petit tres- " pass."

Lord Gillies.—I wish I could agree with the learned Judge in thinking this a very easy and simple case. It has cost me much time and reflection to make up my mind upon it.

The debate opens four important questions, each of considerable difficulty. I shall state them in what appears to me to be their natural order. It is a little different from that which has been adopted by the learned counsel for the pannel, in the very able paper which has been drawn by Mr. Moncreiff. But this is of no consequence. I shall, in the course of delivering my opinion, take notice of each of the points which he has brought under our consideration.

1. The first question in the order in which I propose to consider them is, Whether the oath, as set forth in the indictment, is of the description alleged? Does it purport or intend to bind to commit any treason, or murder, or any capital felony?

2. The second question is this, If it shall appear that the oath is, or may be of the description alleged, is it incumbent on the prosecutor to specify or describe in his indictment the *crime*, to the commission of which he states that the oath imports an obligation?

3. The third question is, Whether the prosecutor was bound or not to specify the crime, has he in this indictment specified or described it? And, if so, is his specification or description of it accurate and correct, and such as your Lordships can sustain as a proper definition of a capital felony, or of a treason?

4. The fourth and last question to which I propose to speak is, Does the offence disclosed in this indictment, as explained by the prosecutor, amount to a case of treason?

and, if so, can it, or ought it to be tried as a felony? This last is the question treated in the supplementary information for the prisoner.

I shall speak to these questions in the order in which I have stated them. But first of all, I wish to call the attention of your Lordships to the terms of the indictment itself, and to those rules and principles by which it appears to me that we must be guided in judging of its relevancy.

I need not tell your Lordships, that in all criminal cases, the crime which the prosecutor means to charge must be distinctly stated in the major proposition of the indictment; and in this, as in every other indictment, we must look, and have only to look at the major proposition in order to discover what the crime is of which the prisoner is accused. That crime, whatever it may be, statutory or not, *malum prohibitum*, or *malum in se*, so set forth in the major proposition of the indictment, is the crime charged, and that crime alone, and no other, can be proved by the public prosecutor.

Now, in the major proposition of this indictment, what is the crime set forth? The crime there set forth, so far as regards any acts done by the prisoner, is merely that of administering an oath. There is no other fact charged against him. The single solitary act charged is that of administering an oath of a certain description, viz. an oath "purporting or "intending to bind the person taking the same to commit "any treason, or murder, or any felony punishable by law "with death."

The mere act of administering this oath, is the crime charged. And for the trial of this charge there are just two points which this indictment brings under the consideration of the tribunal which has to judge of the guilt or innocence of the prisoner. It is to be considered *first*, whether the act was done—whether the oath was administered? and *secondly*, whether the oath be of the description alleged in the indictment? The purpose or intention of the party, except that he intended to administer the oath, is not charged here. Whether his intentions were guilty or innocent is not stated, and is therefore excluded from our inquiry as not essential to it. From the beginning to the end of the major proposition of this indictment, you will not find any thing alleged as to the criminal intention of the prisoner farther than what the charge necessarily implies, namely, that he *intentionally* administered an oath of the description there mentioned.

Such is the charge stated in the major proposition of this

indictment, and I need hardly observe to your Lordships, that this charge cannot be extended or rendered broader by any thing contained in the minor proposition, or subsequent part of the indictment. In this part of it the prosecutor's allegations must be confined to the charge contained in the major proposition, and to such facts as may be proved in support of that charge, and in so far as they go beyond that charge his allegations must be rejected and dismissed from our minds in judging of the present case in all its stages.

In the minor proposition of this indictment it is stated, that the pannel "wickedly, maliciously, and feloniously administered, or caused to be administered, an oath binding," &c. in the terms there set forth. The word "traitorously" which stood in the former indictments is omitted here, and the omission is certainly a proper one; but the act is here said to have been done wickedly and feloniously. These words are very properly used with reference to the statute which declared this act to be a felony, and prohibits it under the sanction of a capital punishment, but not in reference to any thing extraneous to the statute, which the purpose and intentions of the party, except that he intended to administer the oath, certainly are.

If the crime be described as it must be, and is set forth in the major proposition, the prosecutor is entitled to prove that the prisoner intended to administer the oath; that he did it intentionally; and this he justly calls a wicked and felonious intention; for, it is so, because he intends to do, and does, that which this act prohibits and punishes with death as a capital crime.

The circumstances stated in the minor proposition, of doing it at secret meetings, &c. further than explanatory of administering the oath, are extraneous, as they are not ingredients of the crime charged in the major proposition. If murder be charged in the major proposition of an indictment, a proof of malicious intention stated in the minor proposition is allowable. If sedition be charged in the major proposition, you allow it to be proved that the party intended to excite disturbance, as that is an essential ingredient in the crime of sedition. But here the crime charged is different. The mere act of administering a certain oath constitutes the whole crime, if the oath is of the description alleged.

I observe it stated, in the ingenious pleading for the public prosecutor, that the intention of the parties and not of the oath must be considered, and that it is absurd to ascribe intention to an oath, "As if there were any sense in personifying an oath and giving it the powers of the understand-

"ing and the will." But an oath, or the words of an oath, may be said to intend, with the same propriety as they are said to mean so and so, and there is no personification in the one case more than in the other. What the legislature refers to, is the intendment of the oath and not the intention of parties. They refer to an oath binding to do so and so; and this is clear from a former act of Parliament in which the words employed are "purporting or intended." In the major proposition of the indictment, is any thing said as to the intention of parties except as to administering this oath? The intention of the pannel to do any other thing than administer the oath is extraneous, and is not charged against him.

Whether he can be allowed to prove that his intentions in what he did were innocent is another question. I must hold he is so entitled, because we cannot convict any man whose intentions are proved to be innocent. The words of the act of Parliament say nothing of the intentions of parties; not that the legislature held that where intention is innocent, any person is to be punished; but the legislature may hold, and seems here to hold, that the criminal intention is to be presumed from the commission of the fact which it prohibits—that there is a presumption that any person who administers such an oath is actuated by a wicked and felonious intention. The view of the case which I have now taken, is supported by the terms of the indictment itself; for criminal intention, except as to administering the oath, is nowhere alleged; and this is right, as nothing else is comprehended in the major proposition.

This brings me back to the major proposition, What is the crime? Administering an oath. What else is included in the charge? Only the nature of the oath or obligation. It must be one purporting or intending to bind the persons taking the same to commit treason. Assuming the fact, as to the oath being administered, which in this stage of the proceeding we are bound to assume, nothing remains for us but to interpret the oath said to have been administered, and the purport of which is set forth in this indictment. This we must do, in judging of the relevancy, and a most delicate task it is.

Is it, or not, an oath purporting or intending to bind to commit treason? We have no alternative; we must return an answer to this question either in the negative or affirmative—the former if we reject, the latter if we sustain the relevancy of the indictment. And what is the consequence of a judgment to the last effect sustaining the relevancy of

this indictment? By that judgment we declare, by our deliberate opinions, that the oath is of the import alleged in the indictment, and declared in the statute. And what is the consequence?—that the administrator of the oath ought to be punished with death. I do not question the right or power of the jury to return a verdict of not guilty although we find the indictment relevant, and although the fact of having administered the oath be proved; but such a verdict would directly contradict our judgment. The Court finds the oath purporting or intending to bind to commit treason, and the jury says it is not of that import. The case is different from other trials, where the direction given to the jury forms no part of the record. If we sustain the relevancy of the indictment, we put an interpretation upon this oath; and that interpretation is to be contradicted if the fact of administering be proved, and the jury find the pannel not guilty. The solemn judgment of your Lordships, pronounced under the sanction of your oaths, is to be contradicted by a verdict of the jury pronounced by them, under the sacred sanction and obligation of their oaths.

Such is the situation in which we are placed, and it is one peculiar to ourselves; for in England there is no such proceeding as this—there is there nothing analagous to the proceeding in which we are now engaged, nothing analogous to our judgment upon the relevancy. We are, as in former times, when, by special indictments, and special findings upon the relevancy, the Court usurped the power of the jury. Certainly nothing could be farther from the intention of the legislature than to occasion this; but England being chiefly contemplated by them, such is the effect of the statute in question, that by our deliberate recorded judgment, declaring the administration of the oath to be a capital crime, the jury cannot, if the facts administering the oath be proved, find the pannel not guilty, without directly contradicting the solemn recorded decision of the Court.

In a charge of sedition, I sustain the relevancy without minutely or critically examining the words charged, because I send the whole to the jury, who judge of the seditious intention as well as of the nature of the words. The essence of the crime in sedition is intention; and as the jury is to judge of that, the Court can seldom reject an indictment for sedition. Here the question is otherwise. All is before us that goes before the jury. The intendment of the oath is to be collected from the oath itself, and the inten-

tion of the party is out of the question. I can well conceive, as was pointed out by the public prosecutor, that an oath might be framed and administered, containing words in a different sense from the common one—a term might be used to denote war, and another to designate the King, &c. These terms might be explained by proof. But here there is nothing of that kind alleged. Here the natural and necessary purport is charged. There is here nothing to be supplied but proof of the administration of the oath. The words of the oath, taken in the natural sense, are said to import an obligation to commit treason. We are to say, whether the words, as set forth in the indictment, do so or not; and in this we are going into the proper province of the jury. The Court and jury are united in fact; and a judge who sustains the relevancy of this indictment must be prepared to say, that, as a juryman, if the fact of administering the oath be proved, he would return a verdict of guilty.

Am I then prepared to return a verdict of guilty in this case? This is a very serious question, and, permit me to say, it is an awful and a difficult question. As to the oath itself, I agree with Lord Hermand in saying it is abominable and shocking. It is impossible to look at it without suspecting, and thinking it probable, it imports an obligation to commit a capital crime. That has been, and is my impression. But the presumption in favour of innocence is not to be redargued by mere suspicion. I am sorry to see, in this information, that the public prosecutor treats this too lightly; he seems to think that the law entertains no such presumption of innocence. I cannot listen to this. I conceive that this presumption is to be found in every code of law which has reason, and religion, and humanity, for a foundation. It is a maxim which ought to be inscribed in indelible characters in the heart of every judge and juryman; and I was happy to hear from Lord Hermand, he is inclined to give full effect to it. To overturn this, there must be legal evidence of guilt, carrying home a degree of conviction short only of absolute certainty. Here suspicion is not sufficient, there must be sufficient proof that this oath imports an obligation to commit treason, to entitle us to sustain the relevancy of this indictment. With this, I shall proceed to the consideration of this oath, for that is the principle upon which I am bound to proceed.

Since this case came before us, a very material alteration has been made upon this oath or its purport. In the two former indictments against the pannel, the word "force" did

not appear. Here it is introduced, and does, in my opinion, make a very material alteration in the nature and import of the oath. I shall first consider it as without the word "force," and I have great doubts as to this oath falling within the act of Parliament. I shall state the grounds of this doubt, after mentioning why I think the import given to the oath groundless. The considerations which indicate a criminal import here are obvious. *First*, The secret meetings. *Second*, Physical strength contrasted with moral. *Third*, The exertion of violence to obtain an alteration of law, particularly if by numbers. The oath shews, by a brotherhood, that a number of persons were to act. Therefore, taking the whole words together, I suspect the import is criminal. I am now talking of the oath as it stood; and I am considering it as any written instrument is considered. I take the whole of the oath together, and this I conceive to be the way to proceed. In the common case, we give the effect to a written instrument which appears agreeable to its general tendency. If A. and B. dispute about a will, I take what I conceive to have been the intention of the testator. But, here, the case is different. My opinion of the instrument must guide me in both cases; but the sort of proof which makes me prefer A. to B. is very different from that conviction which I must feel before I can declare a prisoner to be guilty of a capital crime. I cannot do this, if a meaning other than the one alleged can reasonably be ascribed to the words.

I have great doubts, taking the oath as it originally stood, whether I be entitled to say it is an oath falling under this act of parliament. I agree with my brother, as to the consequences of the wild scheme of introducing universal suffrage and annual parliaments. They strike us as leading to anarchy, and issuing in military despotism. This feeling, as to the political expediency of the objects expressed in it, naturally creates in the mind a strong suspicion of its treasonable import. But I do not think it a legitimate ground of suspicion, and therefore it ought to be discarded from our minds. This object has been recommended by men of high name. It has been stated to be an essential part of the constitution by men of whose fidelity and loyalty there cannot be a doubt; and therefore our view of the object ought not to influence our determination on this occasion. It has appeared laudable and constitutional to men of upright intentions, and it may have appeared in the same light to the party here. In short, we are bound to make a distinction which is often very essen-

tial to the ends of justice, and which has not been attended to sufficiently here—we are bound to distinguish between the end and the means. Whatever opinion we entertain as to the end, we ought not from that to judge of the means. However ruinous the consequences of introducing universal suffrage and annual parliaments may be, the crime of wishing to introduce these is not charged against the pannel. The object is not criminal. The means by which they propose to attain it constitute the crime, and not the object itself; and, because we think the end would destroy the constitution, we must not infer that treason is the means employed for attaining it. This very end has been recommended by men of the highest name. The Duke of Richmond introduced a bill into Parliament, stating that universal suffrage and annual parliaments are the birthright of the inhabitants of this country, and, until so constituted, the country could not be considered free. No man ever imputed to him treasonable intentions, or a desire to subvert the constitution. In short, in order to get at the import of the oath, we must separate the object in view of the parties from the means employed to attain it; for the means alone were criminal. Suppose that these men had come under a similar oath, and that their object had been to obtain a repeal of the law as to the slave trade; that it had been either to obtain the law abolishing the slave trade, a repeal of it; or any other object, as a repeal of the coach tax—you cannot say this oath is an obligation to any crime unless you could say that the same oath for such purposes would be a capital crime. It is therefore our duty to separate all consideration of the object in view from the means employed to carry it into effect. We must look to the terms of the oath itself, and see whether the means would be criminal if employed to obtain any other alteration of any existing law of the country.

Viewing the matter in this light, I may suspect, but how can I be sure any thing illegal was meant by the parties. If the oath had stopped at the obligation to obtain and support "the same to the utmost of my power," the meaning would have been the same. Then, as to the words "physical strength," how could I know it was to be illegally exerted? How can I know violence was to be used, when strength does not denote violence? The question is not whether the oath *may* or *does* import an obligation to commit a capital crime, but whether it *necessarily does* so. As to the material words of the oath engaging to exert physical strength, physical strength may be exerted for politi-

cal purposes, or influencing the legislature, where nothing is done or contemplated at all of a criminal nature. There are instances of this which may be given. We lately have seen a case of a number of misguided and guilty men, setting out to wander on foot from Manchester to London. These were to exert physical strength, and no small share of physical strength, in that expedition. They were guilty, but that they were guilty of a capital crime I doubt. That is an instance of the exertion of physical strength. Higher instances may be found. When it was proposed to recognise the independence of America, Chatham arose from a bed of sickness, came down to the House of Lords, and employed his voice against what he thought was fraught with disgrace to his country. He exerted intellect, he exerted physical strength, and the exertion proved fatal to him. I say, therefore, it is impossible for us to infer that the mere exertion of physical strength infers crime. It does not necessarily do so, and therefore I am not prepared to return a verdict of guilty against the prisoner.

Such is the opinion I have formed upon the oath as it stood. It is now materially altered. The word "force" is introduced; and the terms of the oath, as it now stands, are: "I will support the same to the utmost of my power, "either by moral or physical strength, (or force), as the "case may require." "Force" is within parenthesis; but this has not been sufficiently explained. It is said, the terms were used "not only synonymously but promiscuously." Whether they were used in the same sense, or sometimes the one and sometimes the other, I cannot tell, I must take it as in the indictment; and this oath does appear to me one which does fall under the act of Parliament; one to which the statute does apply; for "force" necessarily denotes violence, and in such a case must have amounted to a capital crime. But while I say that, in this view, the oath falls under the statute, it yet remains to inquire, what is the crime to commit which this oath is an obligation? And this leads me to consider the second question, which is,

If it shall appear the oath is, or may be, of the description alleged, is it incumbent on the prosecutor to specify in the indictment the crime to the commission of which he says the oath imports an obligation?

The public prosecutor contends, he is not bound to specify the crime. It is very true he has said the crime is treason; but this, according to his argument, was unnecessary and superfluous; and so far he is right and consistent.

For if it be necessary to describe the crime at all, to call it treason is no description. Treason is a generic term as well as felony; and some treasons do not differ more from felony than one treason from another. The prosecutor is sensible of this; and though he has stated the crime to be treason, he says he is not bound to give it any farther specification. It is only necessary to look at pages 13 and 14 of the prosecutor's information, to find his doctrine on this subject. On the former page, he says: "Now, what can "the prosecutor set forth of the purport or the intendment, "which is the essence of the crime, except the terms of the "oath itself, and such other circumstances as accompanied "the administration of it, as may throw light upon the "meaning of the administrators or takers? All this he has "done, and more he cannot do. He cannot state more of "the facts than he knows; nor can he state more than was "actually perpetrated; and the oath is the whole fact and "only source of information. Still less can he be called "upon to draw an inference in law from facts that have "never existed. The minor proposition is a detail of facts, "and has nothing to do with law; and if he had drawn "the inference required by the pannel, he would not have "added one *iota* to the relevancy. He has told your Lord-"ships all that was done; the whole facts of the case; and "it is the principal part of those facts, that there was an "obligation to commit a crime. That this crime, if com-"mitted, would have been of a particular description, and "effected in a particular way, is nothing to the purpose, as "it is not the *intended crime*, but the obligation to commit "it, that is the point of dittay." On page 14, the doctrine is explained in still clearer and more unambiguous terms: "He is bound to tell the pannel the facts he intends to "prove against him, and the law by which they are pu-"nishable, in order that he may be prepared for his "defence; but he does not know how it can help the "pannel to shape his defence, to tell him what would have "been the legal consequence of an act of which he is not "accused, and which he only intended to commit. He "might as well be required, in a case of an indictment for "an attempt to poison, to specify the mode of death, and "the legal consequences of murder. It is maintained, that "this indictment would have been perfectly relevant, if it "had merely libelled the wicked and malicious administra-"tion of the oath charged, without a syllable as to what its "purport or intendment is; for if the oath means what "the prosecutor alleges, the prosecutor's gloss upon it is

" mere surplusage. If it did not mean any thing that " comes under the act, then to be sure it would be neces- " sary to libel the hidden meaning and purpose with which " it is administered and taken, otherwise there would be no " relevancy in the charge. But if it openly express the " unlawful meaning, as in the present case, it is itself the " minor proposition, the connecting link between the major " proposition and the conclusion; and the prosecutor knows " no addition that can make the syllogism more perfect. " *Maj.* The administering an oath of a particular descrip- " tion is a crime: *Min.* You did administer the following " oath: *Ergo*, You ought to be punished."

In consistency with this argument, the prosecutor in the commencement states, that " the prisoner's argument rested " on the fallacy of treason being the crime charged;" and the prosecutor says, " this is not a charge of treason. The " crime of administering an oath alone is charged, and the " crime contemplated in the oath is not charged, and need " not therefore be specified." This argument is plain and intelligible, and states accurately the true question which is here raised, namely, whether an indictment under this statute is to be held relevant, because it sets forth the purport of the oath merely, without stating whether such oath intended the person taking it to commit murder, or treason, or felony, and still less stating *the* treason, or *the* felony contemplated. This is truly the question. The setting forth that the oath bound to the commission of treason is surplusage. So the prosecutor says, and consistently says. For, if he is bound to explain whether it is treason or felony that is contemplated, he is bound on the same principle to explain what treason it is that is contemplated.

Now I cannot hold an indictment on this statute relevant which does not explain what the crime is to which the oath binds. I cannot do so upon any principle of reason, or any principle of law. The oaths contemplated by the statute are oaths binding to do a certain act or acts, which, when done, would be treason, murder, or felony. But is it consistent with reason to allow the prosecutor to tell us of the act which it is thus sworn to commit, that he cannot or will not say whether it be treason, or murder, or felony, or what treason, or what felony? Dreadful, indeed, would be the import of this statute, were the prosecutor's interpretation to be sanctioned. A man is to be put on trial for his life, because he administered an oath binding to do an act of which the public prosecutor infers that it may be murder, or that it may be any of the numerous treasons, or that

it may be any of the numberless felonies which are punished with death. Attend for a moment to the consequences of this doctrine. If a verdict of guilty be returned, what is found by such a verdict? That the prisoner administered an oath binding to commit any treason or murder, or any felony, punishable with death. A general verdict on this indictment is just an uncertain special verdict. The essence of the guilt of an offence against this statute consists not in the oath, but in the crime which the oath purports to commit. But here is a verdict of guilty, and neither from it, nor from the record can we learn what the crime is, the intention or instigation to commit which forms the essence of the prisoner's guilt. Now, is this consistent with any notions that are, or ever were entertained of criminal law and justice? But the matter does not end here, it involves consequences still more absurd and dreadful. Such a verdict of guilty may be returned, although there are not any two jurymen agreed in opinion as to the prisoner's guilt. One juryman may think the oath binds to one felony or one treason, and another to a different felony or a different treason. In this very case this may happen. Treason is alleged; but this matters not, for there are ten different treasons, and of eight jurymen each may think a different treason contemplated in the oath. But the principle contended for, and truly at issue, is that no crime need be specified or described, and such an indictment we must sustain, if we sustain this indictment. Can this doctrine be tolerated, or is it more consistent with law than with reason? Mr. Hume has well explained the law of indictments—[Here his Lordship quoted the doctrine of Mr. Hume on this subject]—It is true the prosecutor says, that that which the oath bound to commit is treason. But can he be allowed to allege that an oath binds to commit treason, when he will not or cannot explain what the treason is which it binds to commit? How would this do, if a capital felony instead of treason were alleged, and the sort of felony were not described? But the prosecutor says that the purport of the oath supplies all the deficiencies. But how can this be? Either the oath is quite clear, or it is not. If the purport of the oath be perfectly clear, if that which it binds to do is so obviously an act of murder, or of treason, or of capital felony, why should not the prosecutor tell us what it is? If treason, what treason it is?—If felony, what felony? It is a rule of common sense, as well as of law, on the one hand, not to require from the prosecutor any information or explanation which, from the nature of the case,

it may be impossible or difficult for him to give. But, on the other hand, he is certainly bound to give every information and explanation which is material to the case, which he can give without difficulty. Now, if the purport of the oath be so clear, what prevents him from doing that which he can have no difficulty in doing, namely, describing the crime which it binds to commit?

On the other hand, if the purport of the oath be not clear, if it does not distinctly appear from it what the crime is to which it bound, then it never can supply the deficiency in the indictment, or "form the connecting link between "the major proposition and the conclusion," or render it unnecessary for the prosecutor to describe the crime to which it is alleged to bind.

The prosecutor puts the case of an oath binding *in terminis* to commit treason. This is an extravagant supposition, and I cannot reason on it. An oath may no doubt be administered, binding to commit murder, treason, or felony, *in terminis*. But such an oath could not be in the contemplation of the Legislature, and it would be a proof of lunacy rather than an instance of guilt; but, at any rate, this is not the case here. This oath makes no mention of murder, treason, or felony; and its terms, therefore, neither do nor can remove the necessity of explanation; and we recur to the true question, which is, whether it be necessary to specify in the indictment any crime at all, either murder, felony, or treason? I am clearly of opinion that it is.

3. But the prosecutor has specified treason, and this leads me to the third question which I have mentioned—whether the specification and description in this indictment, of the treason said to be contemplated, be accurate and correct, and such as the Court can sustain?

The indictment sets forth, that the oath purported or intended to bind the persons taking the same to commit treason, by obtaining annual parliaments and universal suffrage, by physical strength or force, and thereby effecting the subversion of the established government, laws, and constitution of this kingdom, by unlawful and violent means. This is a description, and the only description contained in this indictment, of the crime charged. Then, as it appears to me, the treason of obtaining annual parliaments and universal suffrage by physical strength or force, is the treason to which the oath is alleged to bind. Now, is this a treason? The prosecutor says he has done what he was not bound to do. He has set forth the treason in the words I have read. If it be treason to obtain annual parliaments and

universal suffrage, by physical strength or force, *multo majus* must it be treason to effect the subversion of the established government, laws, and constitution of this kingdom, by unlawful and violent means? Yet this latter has been solemnly adjudged not to be treason. The indictment is the same, as if it had said, that the oath bound to obtain annual parliaments, &c. and thereby to commit treason, or to effect the subversion of the established government, &c. and thereby to commit treason. In short, if we sustain this indictment, we must delare that it is treason to obtain annual parliaments, and so on; or to effect the subversion of the established government, and so on; we must find this to be treason, that is, we must declare a new treason. The case of Tresilian is familiar to us, I cannot speak of it so lightly as the learned judge who spoke last. Tresilian suffered most justly; and of this I am sure, there is not one of us but would rather suffer his punishment than incur his guilt. But the case of Strafford, at least, cannot be thus spoken of. He was impeached and attainted, as we all know, of high treason, *for endeavouring to subvert the ancient and fundamental laws and government of his Majesty's realms:* almost the identical words, and words of precisely the same import with those employed to designate treason in this indictment. We all know the result. The attainder of Lord Strafford was reversed by parliament; and whatever may be the opinion entertained by the conduct of that unhappy nobleman, I believe there never has been but one sentiment as to the propriety of this act of reversal. Now the preamble of this act expressly bears, that "the late Earl of "Strafford was impeached of high treason, upon pretence "of endeavouring to subvert the fundamental laws; that "he was condemned upon accumulative treasons, none of the "pretended crimes being treason apart." And for these and other causes, the act of attainder was repealed, revoked, and reversed. Consider the two questions I have stated under this head, combined together, and you will see that we are reduced to this dilemma; either we must find that this oath binds to commit a capital crime, when the prosecutor cannot tell what that crime is, or we must declare a new treason. See how your record will appear. A man is tried, convicted, and executed, and for what? Why for administering an oath binding to commit treason. And what is the treason? Why it is the treason of obtaining annual parliaments and universal suffrage by physical strength or force; or else it is a treason which the prosecutor cannot describe—a treason without a name.

I come now to the fourth question which I propose to consider. This is the question treated in the supplementary information for the prisoner. There is nothing inconsistent in this argument. It proceeds on the assumption, that upon the other points of the case the prosecutor has been successful, and then it is said this difficulty remains, that if he have sufficiently described the oath as binding to commit high treason, then he has made out that the administering such an oath is in itself an act of high treason, and cannot be tried as a felony.

Now, whether this indictment discloses a case of treason, I cannot tell, as the crime is not specified. It may, or it may not be treason, and this is a very powerful additional argument for the necessity of the prosecutor's specifying and describing in his indictment the crime, to the commission of which he states that the oath imports an obligation.

Though the authorities on this point are English authorities, yet the question is one of Scotch law, and I cannot be permitted to say that I am ignorant of the law of England on this subject, for it is the law of Scotland also. It appears to me to be a point made out, that felony merges in treason. As to this, the authorities in pages 14 and 15 of the supplementary information for the prisoner are conclusive, particularly Foster's observation in the case in Dyer; and this being the law of England, I think that, in cases of high treason, it must be the law of Scotland. By the act of Anne, high treason must be tried in Scotland in the same manner as in England. That which is high treason may also be a felony. But if it be tried here as a felony, the act of Anne is violated. By that statute, any act or acts amounting to high treason must be tried as high treason is tried in England. The law has in view what the crime *is*, not what it may be *denominated*; and if the crime charged be treason, the trial of it must proceed in the manner directed by this statute. And further, the law of high treason in England is the law of high treason in Scotland. The law of high treason is the same in both countries. But the law of high treason in Scotland must be altogether different from the English law of high treason, if an offence may be tried as a felony in Scotland, which, in England, must and could only be tried as high treason. The mode of proceeding, no doubt, in such a case, in the two countries, is different. The case supposes, that if the offence is charged as a felony, and consequently the procedure, in the first instance, will be according to the law of felony in each country, and their law of felony is different, although their

law of high treason be the same. But for this reason we are bound not to permit an offence amounting to high treason to be tried here as a felony. The thing cannot be done here in the same way in which it is done in England, but still it must be done. In England, the trial, after it is begun, may be stopped. This is not so here. But here, if the facts are disclosed as they ought to be, in the indictment, the Court must thence see whether it be a case of treason, and stop it if it be so, before sending it to a jury. Reference has been made to cases formerly tried here of sedition. I remember perfectly well what was said on one of those occasions, by one whose name can never be mentioned in this place without veneration; I mean the late President Blair, who was then Solicitor-General. It was the case of Gerald. I was counsel for the prisoner. I was then a very young man at the bar, and the circumstance made a corresponding impression on me. It was, in fact, one of the first cases of importance that I had been concerned in. I stated that the facts charged, if any thing, amounted to high treason. Mr Solicitor-General Blair did not state that it was no matter—that he was at liberty to proceed either as for high treason, or as for felony, at his pleasure. But he stated, that if I could make it out to be a case of treason, he would be much obliged to me, that he would take the hint; that he would abandon that indictment, and would proceed against the prisoner for high treason accordingly. I will put the case of an indictment for theft, aggravated by house-breaking, and that the facts disclosed in the minor proposition are the attack and capture of the castle of Edinburgh by an armed force, and the plundering it of its stores and ammunition. No doubt this is a theft and housebreaking; but would we consent to try this as a felony? or should we not dismiss such an indictment? Such is the case, independent of the terms of this act of Parliament, the 52d of the King, on which this indictment is laid. But it is said, that the last clause in this act excludes the common law doctrine of felony merging in treason. This clause is in these words. [Here his Lordship read the clause.] This is the clause on which the prosecutor founds his argument. The preceding part of the statute would afford no room for arguing that the doctrine of merging did not apply to cases under this act as much as to any other; and this clause appears to me to go very far, though I doubt if it goes far enough to support the prosecutor's argument. For what is his gloss on the clause? He says, first, that by this clse offences amounting to treason

are made felonies, or are triable as felonies; and, secondly, that by this clause these offences may be tried and punished either as felonies or as treasons. Now, if such be the import and effect of this clause, it must be admitted that it makes an immense inroad, both on common and statutory law. Further, it must be admitted, that all this is done by implication merely. If this were the intention of the Legislature, why did it not say so expressly? First, it is said it declares a treason to be felony, or to be triable as felony. See how an act of the same sort is treated of by the first authorities in the law, the first authorities in our law, for the laws are the same. [Here his Lordship read from p. 27. and p. 28. of the supplementary information, the act 3d H. VII. c. 14. Lord Coke's observation thereon. Lord Hale's P. C. pages 111, 260, 261; and Judge Foster, pages 200, 201.] Lord Coke and Lord Hale state the enacting an offence to be a felony to be a judgment of Parliament, that it was not treason; and Judge Foster says, that Hale's reasons for bare words not being an over-act of treason, founded on acts which make the speaking those words felony or misdemeanour, are unanswerable. For, he says, if those words had been deemed overt-acts by the statutes of treasons, the Legislature could not with any sort of consistency have treated them as felony or misdemeanour. And, he adds, in a note to the same purpose, I rely on those acts which make words felony or misdemeanour. The prosecutor says, that that is done by this act, which Hale says it cannot be thought that Parliament would do; and what Foster says, it could not with any sort of consistency do. But, I admit, that, if the words of the act were explicit, it would be of no use to quote those authorities. The Legislature *may* do that which Hale says it cannot be supposed it would do, and which Foster says it could not do with any sort of consistency, and, if it does so, we must bend to its authority. But where it has not done so expressly, and where by inference and implication such a meaning is to be extracted, the authorities referred to seem sufficient to prevent our adopting such an interpretation. But there is another act which does make certain treasons triable as felonies, the act of the 39th and 40th of the King, which is quoted in this information; and see in what manner it has proceeded, in order to accomplish this matter —[Here his Lordship read the act 39th and 40th Geo. III. c. 93, declaring that in cases of high treason, in compassing the King's death, where the overt-act shall be his assassination or any direct attack against his life, the person shall be in-

dicted and tried, as if charged with murder.]—But the prosecutor says, secondly, such offences are triable, and may be prosecuted either as felonies or as treasons. This appears to me to be the most extraordinary part of the whole argument.—In saying this, I look to the consequences that must inevitably follow from such a regulation—1st, as they affect the safety of the subject, who may thus be tried substantially for treason, and punished with death, although deprived of all those benefits and safeguards, which, in cases of treason, have been deemed necessary for his protection. I look next to the safety and dignity of the Crown itself. The greatest crimes against the Crown may thus escape from justice. I put the case of an oath to provide poison for the King, or of a person taking an oath to administer poison to the King, and that the poison is actually provided; yet this person may be tried only for a transportable felony,—may even be tried under the act, the 37th of the King, by which he can only be transported for seven years. It appears to me a very difficult matter to put such an interpretation on this act. I think this clause not unattended with difficulty; but, on the whole, I incline to adopt the explanation which is very ingeniously given by the counsel for the prisoner in the supplementary information.

It is not, however, necessary for me, in the view I have of this case, to determine this point. I have not got so far. I am clearly of opinion, that the indictment is not relevant on the other grounds which I have stated, and that it cannot be remitted to the knowledge of an Assize.

Lord Pitmilly.—In forming my opinion upon the relevancy of the indictment, I find it necessary to begin by fixing the true import of the oath, for administering which the indictment has been raised against the prisoner at the bar. In considering this point, there are two questions to be attended to, one a question of fact, the other a question of law. We must first fix in our minds, what, in point of fact, the acts were, what the line of conduct was, which the persons taking this oath were bound to perform and to follow; and next, we must determine, in law, whether these facts, and that line of conduct, would have amounted to treason.

In considering the first of these matters, viz. the import of the obligation, I agree completely with the counsel for the prisoner, that we are to consider, not what the administrator intended, but what the oath itself purports,

The act of Parliament speaks of an oath *purporting or intending;* and, as has been remarked by Lord Gillies, in that respect, this act is distinguished from the former act 37th George III. which speaks of an oath *purporting or intended.*

At the same time, this observation is subject to a certain degree of explanation. The act speaks of an oath *purporting or intending.* The word "*intending*" cannot be taken as surplusage. It must have a meaning different from the meaning of the word "*purporting.*" The case in the view of the legislature must have been the case of an oath which is ambiguously or mysteriously expressed, the *purport* of which may not be clear to those who have not the key, but the *intention* of which may be matter of proof. In illustration of this, I may remind your Lordships of a late trial for forgery, in which we had a letter from an accomplice, to the prisoner, produced, desiring him to send "*soft goods,*" or "*soft yarn,*" meaning by this expression, as appeared from the evidence, forged notes. Now this was a letter *intending*, though not *purporting* a commission for forged bank of England notes. This is the kind of case which must have been in the view of the legislature, when these words, *purporting* or *intending* were inserted in this act of parliament.

It is evident, however, that this remark has little practical application at present: For the public prosecutor does not say that the oath given in the indictment had any secret *intention* different from its *purport*, and he does not state facts on which such an allegation might have rested.

I also agree with the prisoner's counsel, that in considering the import of this oath, if there be any thing doubtful in it, the presumption must be in favour of innocence. I do not indeed see that there is room for the application of the maxim referred to by counsel, "*id tantum possumus quod de jure possumus.*" But we are not to presume guilt because the public prosecutor alleges guilt. We must see guilt made out before yielding our belief; and until guilt is established, we must hold the presumption to be in favour of innocence.

In the next place, it is plain, that in construing the oath, we must take the whole oath together, and consider it, as one part of it bears upon another; not as five or six different oaths, but as different parts of the same oath.

Now, when this is done, it does not appear to me that there is room for any doubt about the *import* of the oath.

The leading proposition is, that the taker is to support "the same," that is, to support his endeavours "to obtain "for all the people in Great Britain and Ireland, not dis- "qualified by crimes or insanity, the elective franchise, at "the age of 21, with free and equal representation, and "annual parliaments, to the utmost of his power, either "by moral or physical strength (or force), as the case may "require." Here it must be observed, first, that physical strength, or force, is directly opposed to, and contradistinguished from moral strength; and, next, we must attend to the circumstances in which this great struggle was to be made. The taker of the oath is to prepare for the attainment of the objects, "by endeavouring to form a "brotherhood of affection amongst Britons of every de- "scription, who are considered worthy of confidence." Then he is to make his endeavours to obtain annual parliaments, and universal suffrage, "by moral or physical "strength (or force), as the case may require;" not defining or limiting the extent or nature of these endeavours, except by the necessity of the case. And, having stated all this, he swears "that neither hopes, fears, rewards, or pu- "nishments, shall induce me to inform on, or give evi- "dence against any member or members, collectively or "individually, for any act or expression done or made, "in or out, in this or similar societies, under the punish- "ment of death, to be inflicted on me by any member or "members of such societies. So help me God, and keep "me stedfast." Thus the oath plainly refers to numbers; to those numbers being linked in associations in the strictest confidence; to their acts being such as might bring upon them trial and punishment, and requiring that they should swear not to inform upon one another under pain of death.

I have read this oath again and again, attending, as I am bound to do, to all its parts—not separating the parts, but taking them as they bear upon one another; and it is impossible for me to put any but one construction upon it.

No doubt the introduction into this indictment of the word "force," strengthens the case on the question of relevancy, but the word "force" does not appear to me so necessary as it does to my brother. For, I take the oath altogether. If the clause in which the word "*force*" appears had stood by itself, the insertion or omission of this word might have been serious; but, taking the clause along with the rest of the oath, the meaning of the whole is clear.

It is in vain to say, that the oath amounts to nothing more than if it had contained a mere vague engagement to support universal suffrage and annual parliaments, to the utmost power of the persons taking the oath. The difference between such an oath and the one in the indictment is, that the former *might* comprehend all that is in the latter, but it would not have necessarily done so. There would have been room for the legal presumption of innocence.

It is also in vain to say, there are many ways in which lawful endeavours, by moral or physical strength, or force, may be employed to obtain universal suffrage and annual parliaments; as making journeys; making speeches; erecting hustings; keeping off crowds, &c. It is certainly true, the person taking the oath may be bound to do these things, but *is he bound to do nothing more?* What means the brotherhood of affection—the oath of secrecy—the infliction of death in case of revealing—if all that was intended was to do the innocent things above mentioned? It is impossible for any man, consulting soberly his reason, to think such was the meaning of the oath. There is no presumption of innocence, no stretch of charity, which can warrant such a conclusion.

It is said, there are unlawful acts by which universal suffrage and annual parliaments might be obtained, which are not treasonable acts, as arresting members of parliament, &c. This is true; and, as the particular acts to be done are not defined in the oath itself, it is necessary to take the whole oath, and to consider what is the true import of the engagement. If there were any doubt, I should construe it in favour of innocence; but I cannot have any doubt, when, for an object that could only be legally obtained through parliament, physical strength or force, with all the concomitants mentioned in the oath, was to be employed.

I do not take it much into account in considering the case, that the object to be attained was annual parliaments and universal suffrage. In the mind of every cool inquirer, the effects of universal suffrage and annual parliaments must be deprecated; but I put the case on the same footing as an attempt to effect any law whatever. The difference is only this, that the extravagance of the object here in view shows more distinctly that the parties were determined to resort to strong measures. It is the *means* to be resorted to for the attainment of an object of general concern—the employment of physical strength or

force—and the whole circumstances referred to in the oath, that leave in my mind no doubt as to the nature of the criminal intentions.

It is in this view that it appears to me this word "force" is not so important as has been supposed. I shall just take the case that has been put, for the sake of argument, in the very able and ingenious paper by Mr. Moncrieff. I shall suppose that the oath might have been binding in a court of law, and that the taker were told, the blow is now to be struck; compulsory measures are to be used, and you must join us in them. Is it possible to say that he might answer, I will make speeches, and print them; I will assist in putting up hustings, and so forth, but I will do nothing illegal. "*Id tantum possumus quod de jure possumus.*" The reply would have been, You are bound to do the things you mention; but if you did not mean to do a great deal more, you need not have come under such an obligation.

Having said this much on the import of the oath, the next question is an inquiry in point of law,

Does the oath amount to treason? Upon this subject the authorities have been so frequently referred to, so often quoted in your presence, and read by us in private, and are so well stated in two or three pages of the information for the prosecutor, that I shall not detain you by going over them. The principle is simply this: that an attempt to obtain, by open force, such objects as were in view, with or without warlike instruments, is the crime of treason. And I shall only make this observation, that, even if the measures complained of by the parties to the oath were not sanctioned by law, yet it would be the crime of treason to introduce new measures of general concern by force, and without the intervention of parliament; and still more when the attempt is to overturn what is sanctioned by law. I shall just beg leave to read what Judge Foster says, in stating the case of Damaree: "If," says he, "the "meeting-houses of the Protestant dissenters had been "erected and supported in defiance of all law, a rising to "destroy such houses in general would have fallen under "the rule laid down in Keiling, with regard to the demo-"lishing all bawdy-houses. But since the meeting-houses "of Protestant dissenters are, by the toleration act, taken "under the protection of the law, the insurrection in the "present case was to be considered as a public declaration "by the rabble against that act, and an attempt to render "it ineffectual by numbers and open force:" an attempt

by force and violence to take law into their hands, and bring about a matter of general concern.

Without adding more on this point of the case, I am clearly of opinion, that the oath purports and intends an obligation to do certain things; which things, if done, would have amounted by law to the crime of treason. In giving this opinion, I feel all the consequences which have been so eloquently stated by my brother. I admit, that if the jury shall think otherwise, they will differ from the opinion of the Court—but this I cannot help—I am bound to give my opinion upon the relevancy of the indictment. I am bound, in doing so, to judge of the import of the oath. I do it conscientiously, and the jury will do the same.

The next question is, whether the indictment is not relevant, because it does not specify the kind of treason which the persons taking the oath were bound to commit? This, I apprehend, is strictly and entirely a question about the technical form of an indictment by the law of Scotland. It does not appear to me to embrace any question of the law of treason whatever. It goes to a question of form only, and must be regulated by general principles applicable to other cases, as well as to that of treason.

The *major* proposition does not charge the crime of treason. It charges the statutory felony of administering an oath, purporting or intending to commit treason. It is founded entirely upon the act of the 52d of the King. It merely recites the act; it quotes the whole three clauses engrossed in the act of Parliament.

What then does the *minor* proposition do? First, it asserts, as is necessary in every indictment, that the pannel is guilty of one or other of the crimes charged in the major proposition. After making this assertion, it goes on to the assumption; and it mentions distinctly the times when this is said to have been done, the places, the persons to whom the oath is said to have been administered. All this is distinctly pointed out. The manner of the criminal act is next announced, in the best way it could be done, by engrossing the oath itself. The minor proposition goes on to say, that the oath purports to bind to commit treason. This is an inference in law that is to be judged of from the oath itself.

This matter may be illustrated by an example.—Suppose an indictment accused a person of *murder*. The minor proposition must state the manner of committing the crime, whether it was by stabbing, or poisoning, or otherwise.

To state generally the crime of murder would not do; but the manner of committing it must be mentioned. But, if it were an indictment under the 52d of the King, for administering an oath purporting or intending to bind to commit *murder*, and if the *oath* bore in general, and without further specification, that the taker was to murder all who should oppose him, it would not be necessary to do any thing more in the indictment, than just to libel the oath itself, and then assert in general terms that it purported to bind to commit murder.

It is said, there are many felonies, and many treasons; and that it is necessary therefore to specify the kind of treason contemplated. Cases were ingeniously put—one of felony, and one of treason. The case of an oath binding to commit a felony was first stated by Mr. Cranstoun: the case was put of a person bound to carry away a certain quantity of corn; and, it was said, the public prosecutor could not recite the oath, and then generally and vaguely assert, that it bound to commit a felony, as it might be one of many different felonies. In the same way, a case was put of a treason said to be committed, by an oath binding the taker to deliver goods or money to a person in France, which it was said might amount to one or other of various treasons

But observe, there is in the cases put, not a mere general engagement to do whatever may be required, as in the case in the oath libelled, but an engagement to do a particular act, carrying away corn in the one case, and delivering goods to a person in France in the other. In such cases, it may be, that the public prosecutor should inquire about the particular felony, or treason in contemplation, and explain it in the minor proposition.

But there appears to me to be, independent of what has now been observed, a decisive answer to this objection to the indictment under consideration. The objection is, that the indictment ought to have specified the particular treason which the takers are said to be bound to commit. That without such specification, one or more jurymen may have one kind of treason in view, and others may contemplate other treasons.

Now, it is admitted into the information for the pannel, and no lawyer could venture to dispute it, that the case might have been laid alternatively as an oath binding to commit one specified treason, or otherwise a different kind of treason also specified, and so on through the whole catalogue. The words of the pannel's information are, (p 41.) "The informant is not at present advised of any

"objection that could be made to an indictment in this "Court, which laid the case *alternatively* as an oath bind- "ing to compass the King's death; *or otherwise*, an oath "binding to levy war; *or otherwise*, an oath binding to con- "spire to levy war, &c." In short, the public prosecutor had nothing to do but to enumerate all the different kinds of treason. He might have taken the range of all the treasons known in the law; and, it is admitted, that this would have been a relevant libel.

Now, I would ask, what better information could have been given to the prisoner by such an indictment, to enable him to prepare for his trial, or to us to judge of the relevancy of the indictment, or to the jury to guide them in their deliberations? Is it better for the prisoner, the Court, or the jury, to state the charge as is here done, or to state that the oath was an oath purporting to bind to commit treason by compassing the King's death, or by levying war, or by adhering to the King's enemies, and so on? No farther information surely is given in the one case than in the other. I cannot conceive, therefore, why it should be stated as necessary to specify the treason in this indictment. The only purpose on account of which this is ever required is, that the prisoner and the Court may know what he is accused of, and for what he is brought to his trial. In a charge of murder, it is necessary to tell him whether it was by stabbing or knocking down, or in what manner the crime was committed, that he may prepare for his defence, and that the Court may judge of the relevancy. If a man be accused of murder, and the thing he has done do not amount to murder, the Court will interrupt the trial. If the manner of the act were not specified, the Court might find relevant what they would not think so if they knew the facts.

The next point I am to consider, is, the fault found with the indictment, in stating that the oath bound the persons taking it "to commit treason, by obtaining annual parlia- "ments and universal suffrage by physical strength or force, "and thereby effecting the subversion of the established go- "vernment, laws, and constitution of this kingdom, by un- "lawful and violent means." It is said, this is a *definition* of an alleged treason, and that it introduces a new species of treason not recognized by the law of this country.

My answer is, 1st, That the passage quoted is no *definition* of treason—no description of treason—and it could not have been introduced in that part of the indictment, if it had been

intended as a definition or description of the alleged treason. It is only a brief statement by the public prosecutor of what he says is the import of the oath, and of what would be the consequences; *first*, of what the oath bound those who took it to do; and, next, of the result which he said would have followed, if the thing had been done. He says, before quoting the oath, that it is an oath binding the takers to obtain universal suffrage and annual parliaments by physical strength or force; and then he states his inference, that if they had done so, they would have effected the subversion of the established government, laws, and constitution of this kingdom, by unlawful and violent means. I am as much satisfied as any person can be, that, if the words above quoted amounted to a charge of a particular treason, if that were to be viewed as a description of a treason alleged against the pursuer, we could not have sustained the indictment. But there is a wide distinction between the prosecutor giving his own account of particular things that were to be done, and drawing his own conclusion, and his stating these things as a substantive treason.

2dly, The words above quoted from the indictment are surplusage. The public prosecutor was not under the necessity of stating any thing of this. He might have stopped in his description at the word "treason," but he has gone on; and, I do not think he has, by doing so, made the indictment either better or worse. In a case of rape, where, after the fact had been stated, the deed was said to have been committed, by having carnal dealing with the woman's body, it was objected, that this might have been some inferior abuse of the woman's person. But the answer, which was sustained by the Court, was, that the expressions objected to were mere surplusage; that the crime was properly charged in the major proposition, and the alleged facts distinctly set forth in the first part of the *minor*.

The last point of this case, which deserves consideration, is the question, Whether this crime, being treason, we must hold that the felony merges in the treason, and cannot be tried as a felony? I agree with my brother, that the disquisition upon this subject, in Mr. Grant's paper, is ingenious and able. I read the argument with great pleasure, and obtained much information from it. But, after giving it full consideration, it does not appear to me to be well founded.

Upon this branch of the case, I observe, *first*, that the common law maxim of the law of England, that the greater crime drowns the lesser, is directly the reverse of the common law maxim of this country. Here, it is well established, that

when a fact amounts to one or other crime of different denominations, it is in the power of the public prosecutor to charge the lesser and not the greater. This distinction between the laws of the two countries, appears to result from prosecutions being conducted at the instance of the private party generally in the one country, and there being a public prosecutor in the other.

With regard to the crime of treason in particular, there is no question that, in Scotland, before the Union, the maxim above referred to was followed in cases of treason as well as in cases of other crimes. There were aggravated thefts and murders which were also held to be treasons. In these cases, the prosecutor might charge the crime either as a treason, or as a theft or murder. Nay more, when he charged the crime alternatively in the indictment, he might depart *at the trial* from the higher charge, and insist in the lesser. Sir George M'Kenzie disapproves of this, because the pannel might be taken at unawares, and could not be prepared at his trial, not knowing before hand in which charge the public prosecutor was to insist. But it never was disputed that the public prosecutor had an undoubted right to make the election, when drawing his indictment, and to charge the lower crime.—*Hume on Trial*, vol. i. p. 276.

Extreme cases may be put for the sake of illustrating an argument; but I would beg leave to answer such cases, by supposing a case that might readily have occurred in the prosecution of the prisoner at the bar. Let it be supposed that he had been charged in the indictment with the crime of sedition;—or suppose that the indictment had charged him with sedition, as also with being guilty under the act of the 52d George III.:—an indictment laid in either of these ways would have been relevant unquestionably, and probably few persons would have disapproved of it. Yet, according to the argument now under consideration, such an indictment must have been quashed. We would have been told, that the sedition, or the statutory crime, had merged in treason, and that the prisoner could only be tried for treason, and must have a grand jury and 35 peremptory challenges.

In Lord George Gordon's case, Lord Mansfield mentions, among acts of treason, insurrections "*to resist execution of the militia laws.*" We have had such insurrections in Scotland, and the offenders have been tried in the usual way, without a doubt ever having been expressed on the legality of the proceeding.

In many cases of aggravated sedition, the Courts have

delivered it as their opinion, that the facts stated in the indictment might have been charged as treason; but they never thought of stopping short on this account, and of denying the right of the public prosecutor to bring the offender to justice as guilty of sedition.

In short there is no precedent for the doctrine contended for by Mr. Grant, in any case circumstanced like the present; and it would be very much to be regretted if there was any foundation for it. The only case in which this doctrine was broached, was in the case of M'Lauchlan, reported by M'Laurin. I do not found on the decision pronounced in that case as a judgment on the point; for the sounder opinion appears to be, that the prisoner, in the case referred to, was guilty of riot and not of treason. But I mention the case as the only one in which the point of law now so strenuously contended for was so much as hinted at, or brought under the consideration of the Court.

But, whatever may be the rule in the general case, the first and last clause in the act 52d George III. is decisive against the doctrine in the present case. These clauses, which are recited in the papers, are perfectly decisive of the question; and the argument which results from the simple reading of them is unanswerable.

Mr Grant refers to the "*wary clause*" mentioned by Lord Hale, as in 1st and 2d Philip and Mary, cap. 3. &c. But the existence of this "*wary clause*" in these old acts of Parliament, is very much against the argument for the prisoner; for it would have been an easy matter, if this had been the intention of the legislature, to insert the same "wary clause" in the first part or preamble of the act of the 52d of the King.

On the whole, I am of opinion that the indictment is relevant.

Lord Reston.—This is undoubtedly a most important and interesting case, on various considerations. It is important and interesting, because this and the case of Edgar, are the first occasions we have had to consider the nature of the act of Parliament upon which the indictments are founded. It is of importance, because the charge against the pannel is a capital charge; and, it is likewise of importance, because, although this indictment contain no charge of treason, yet, according to the view of the prosecutor, several hundred persons must have had the commission of treason in contemplation. I am not sure, if this case has not also acquired an additional degree of interest from the very able manner in which it has

been argued. It has been argued with most consummate ability on both sides of the bar. Particularly on the part of the prisoner, there has been a degree of anxiety, ingenuity, and talent, exerted, which, I hope, I may say, without being illiberal, could not be surpassed by the bar of any other country. I believe, in very few cases, if in any, has so great a mass of talent been united in favour of one prisoner, as in this case.

The indictment is founded entirely on the 52d of the King. It is entirely a statutory offence which is charged. The major proposition consists of three different clauses, quoted from the act of parliament. The substance of them, is, that it is made felony, without benefit of clergy, to administer, or aid, or cause to be administered, or assist at the administering of any oath or engagement, purporting or intending to bind the "person taking the same to commit any treason or murder, "or any felony punishable by law with death." This is the charge, and a statutory one alone, which is made against the prisoner at the bar. In the minor proposition, he is stated to have been guilty of one or more of the crimes libelled in the major: "In so far as he did, at secret meetings, and on other "occasions, at Glasgow, and in the vicinity thereof, in the "course of the months of November and December, 1816, "and January and February, 1817, wickedly, maliciously, "and feloniously, administer, or cause to be administered, or "did aid, or assist at the administering, to a great number of "persons, to the amount of several hundreds, an oath or en-"gagement, or an engagement or obligation in the nature of "an oath, purporting or intending to bind the persons taking "the same to commit *treason*, by obtaining annual parliaments "and universal suffrage, by physical strength or force, and "thereby effecting the subversion of the established govern-"ment, laws, and constitution of this kingdom, by unlawful "and violent means."

In this part of the minor proposition of the libel, the public prosecutor confines his charge to the pannel having administered an oath, "purporting or intending to bind to commit "*treason*," without defining or intending to define the particular species of treason which the oath bound him to commit; and, he then gives his own commentary upon the oath which was taken.

The minor proposition then gives the tenor of the oath.

This being done, the libel then states the particular instances in which this oath was so administered, and the circumstances in which it was administered by the pannel. It specifies, that it was administered, and at secret meetings, at Hugh Dickson's, on the 20th of December, 1816. 2*dly*,

At William Legget's, on the 1st of January, 1817. *3dly*, At Niell Munn's, on the 4th of that month; *4thly*, At the house of John Robertson, on the 5th of February; and, lastly, that the prisoner was apprehended at another meeting held for the same purpose, and that on that occasion he assumed a false name.

This is the indictment we are called upon to judge of; and, upon it, three questions have arisen, upon which it is necessary that we should have distinct opinions.

In the *first* place, (and I agree in considering this the main point at issue,)—whether the oath be of such a nature as to come within the statute?

The *second* question is, whether the indictment (supposing the oath to be such as to make room for the application of the statute) be drawn with such precision as to warrant it to be sent to a jury?

And, the last is the new question eloquently argued in the supplementary information. It is here assumed that the oath is sufficient, and the specification complete; and it is argued, that, upon this supposition, the oath must have purported or intended an obligation to commit the species of treason, known by the name of levying war against the King:—that such oath must be an overt act of treason, under the head of compassing or imagining the death of the King, and actual treason, under 36th George III. c. 7. as compassing to levy war against the King, or overawe parliament; that, therefore, the pannel cannot be tried under the 52d of the King, but for treason only; because, according to the maxim of the English law, which in treason is the law of Scotland, the felony merges in the treason. These are the three points upon which it is necessary to form our opinions; and, upon each of them, I shall make a few observations.

The first question is, what is the import of the oath here administered? Upon this subject, my view is so obvious, that it could not fail to be anticipated by the Judges who have already spoken; and it has been anticipated by Lord Pitmilly. But, because my view is an obvious one, it is not, upon that account, the less likely to be well founded; for, I conceive, that in such questions, the most natural view is the most likely to be that which is correct. When the crime consists in the language employed, the most obvious meaning of that language is the safest and fairest to apply to the situation of the pannel. Crimes are generally committed by persons in the lower ranks of life; and we must consider in what sense the language employed must have presented itself to their minds when they employed it. Your Lordships will never

allow the public prosecutor, by forced construction, to infer a criminal meaning, where the words are obviously innocent. But on the other hand, as little will you allow the counsel for the pannel, by ingenious refinements, to make that innocent, which, according to the common meaning of words, is, in the minds of impartial persons, criminal. In such case, your Lordships, first, and the jury afterwards, will fall to mediate between the different parties, and draw an impartial conclusion from the whole circumstances of the case.

Here, I conceive the purport or intention of the oath must be taken chiefly from the terms employed; but I do not consider it is wholly incompetent for the public prosecutor, in this case, to have recourse to circumstances which do not appear *ex facie* of the oath. I think he is not to be confined to the precise words of the oath. Here, there are two words employed, *purporting* or *intending*. On looking into the dictionary, I find that "to purport" is "to intend." If the word intend, had not been used in the statute, I should have understood that purport and intend were to be considered as synonymous; but the statute uses both words, and I conceive that it must have employed them as having different meanings; I apprehend, that, when both are used, we must consider their difference. Suppose the parties had used a cipher, and that it had consisted in the use of common words, with another meaning, it would be competent, under this act, to libel this oath, and prove what was *intended* by the cipher. The prosecutor might have libelled that the *intention* was criminal, though the words of the oath were *ex facie* innocent. He might have done so under the word "intend," in the act of parliament. As the two words must be understood to have different meanings here, I hold "purport" to denote the common meaning of words, and "intend," any meaning attached to the words by the parties, though different from the sense generally given to them.

In that view, I consider the public prosecutor, in this case, is entitled to libel and prove circumstances indicative of intention. He has libelled, and is entitled to prove such *indiciæ* of intention, as, that the oath was administered at secret meetings, and to great numbers of persons.

But, in the present case, in order to ascertain the import and intention of this oath, there is no occasion to go beyond the terms employed in it. To understand the meaning of the oath, it is just requisite that a person shall read it from beginning to end, and say what is the meaning it conveys to his mind. It is impossible, in my humble opinion, to read it with no other object than to ascertain the meaning and intention,

without being convinced that it was highly criminal. It implies that there was to be an association consisting of many persons, bound by an oath—that their proceedings were to be kept secret—and all this under the sanction of the death of informers, to be inflicted by any member of the association. The object in view was to bring about, by physical strength or force, what, if brought about, would have been a complete subversion of the present government—annual parliaments, and universal suffrage, " the elective franchise at the age of " 21, with free and equal representation, and annual parliaments."

That is the meaning which the oath conveys to my mind, on reading it with no other view than to discover its meaning. But, I have no objection to analyse the oath in parts. The objection I have to the argument for the pannel is, that it considers the oath as composed of different *wholes*, capable of standing by themselves; whereas there is only one oath consisting of different parts.

I shall, however, consider them separately.

The oath sets out with taking the parties bound to " per- " severe in endeavouring to form a brotherhood of affection " amongst Britons of every description, who are considered " worthy of confidence." To form such brotherhood of affection under the sanction of an oath is not in itself a crime, but there is something so peculiar in this, that it must excite attention. One would inquire what was to be the meaning of this brotherhood? Could such a brotherhood be formed for the mere purposes of charity and benevolence? Would there be the formality of an oath for any thing of this kind? It might be innocent, but would be unintelligible. We think what is to follow. It is enough to excite attention and suspicion as to the object. For this, we must go to the next clause: " I " will persevere in my endeavours to obtain for all the people " in Great Britain and Ireland, not disqualified by crimes or " insanity, the elective franchise at the age of 21, with free " and equal representation, and annual parliaments." The object, therefore, was clearly political. It was not an institution for charity or general acts of friendship; but, it was a political institution. Politics alone were in the view of the parties; and what was the species of politics in view? The object was, to bring about annual Parliaments and universal suffrage, which all sober-minded persons consider as a complete subversion of the government, and quite inconsistent with any rational ideas of liberty. Such was the object of this brotherhood when formed.

Even this might not have been matter of accusation

against the parties, if they had merely confined themselves to speculation and discussion. There might have been nothing to find fault with, if they had confined themselves to mere philosophical speculation on the different kinds of government, and given the preference to that which is stated in the oath. But associations were formed; not one, but many, in order to bring about the change in the government. They were treading upon dangerous ground; and it would depend upon the means they were to have used, whether their conduct was to be considered criminal. What were the means they had in view? See the next paragraph: "And that I will support "the same to the utmost of my power, either by moral or phy- "sical strength (or force), as the case may require." I say here the object was to be brought about by illegal means. It is illegal to bring about this complete change and subversion of the constitution, by physical force. The association was formed for a political purpose; the object was to introduce what was dangerous and irrational; and this was to be done by illegal means.

And the consciousness of the parties themselves, that they were to act illegally, appears from the last clause. The meetings were secret. "And I do further swear, that neither "hopes, fears, rewards, or punishments, shall induce me to in- "form on, or give evidence against any member or members, "collectively or individually, for any act or expression done or "made, in or out, in this or similar societies, under the punish- "ment of death, to be inflicted on me by any member or mem- "bers of such societies. So help me God, and keep me stedfast!" Here is complete demonstration that the parties, engaged in this business, understood the means to be employed were illegal. Their conduct was illegal and they were conscious of it. Else why had they recourse to an oath of secrecy? This clause shews, too, that many people were to be engaged, and various associations formed, and all to be united together, under the sanction of the oath. And to whom was to be given the right of punishing by death a breach of secrecy? To any member or members, not only of that particular society, but to all members of any other society of the same description. So that they were all to constitute one society, and the power of life and death was to be given to any member of the association.

I say, therefore, that, considering the oath either as a whole or in parts in subordination to each other, it is clearly illegal, and it purports and intends to do that which the parties themselves knew to be illegal.

All this would have been highly criminal, suppose no act of Parliament had been passed. All this would have been a

high crime at common law. But here we are called to judge of a particular act of Parliament, and to judge whether this crime is what is meant by the act of Parliament. The act of Parliament makes the crime consist in the oath itself; and it entitles the public prosecutor to apprehend persons, and to deal with them as guilty when the oath is taken.

In order to understand the character of the oath, I must figure to myself what are the acts the oath led the parties to commit. If the parties had not rested upon the oath, but gone into action—if they had been successful, what would have been the consesequence? They must have overturned the government and the present constitution of things. We have not at present universal suffrage and annual Parliaments. And the parties must have effected this change by those means which they knew to be illegal. Had the prosecutor waited till they attempted to carry their plans into execution, and were unsuccessful, what would have been their crime? Treason—levying war against the King. I conceive this is the species of crime of which they would have been guilty. It is impossible to go with any minuteness into the kind of conduct they might have adopted. Had they been allowed to act upon the oath, and been unsuccessful, their crimes might have been charged as compassing and imagining the King's death. The facts charged lead necessarily to such conclusion. And therefore, under this statute, I can have no doubt, that what is stated here, amounts to the major proposition in the libel, and that this is an oath purporting and binding the person taking it to commit treason. I therefore answer the first question in favour of the public prosecutor—that the oath is sufficient to bring the parties within the act of Parliament.

The next question is, how far the charge is sufficiently explicit; and this is the only point upon which I have ever entertained difficulty. I first supposed the want of specification of the species of treason, must have cast the indictment altogether. I am now of opinion, that it does not. Though still the case appears to me not altogether without difficulty. In no case will impossibilities be asked of a public prosecutor. In the present case, the libel is on this act of Parliament. You cannot oblige him to charge any overt act beyond the act itself. The act entitles him, after the oath is administered, to consider the crime completed, and therefore, all that can be asked of him, is to charge the time, place, and circumstances in which the oath was administered, and the treasonable nature of it. That is all that can absolutely be demanded of him to do; and he has done this in the present indictment. He has specified four different meetings, at which

the oath was administered, and a fifth for the purpose of its being administered. He has mentioned the places and the circumstances in which the oath was administered. He has mentioned that it was administered at secret meetings. He has, therefore, in the major proposition, stated the crime which he charges, and in the minor all the facts within his knowledge; and therefore, I am of opinion, he has done every thing which he was bound to do. He was not bound to state inferences more than he has done. He has stated all the act required of him, although nothing was done in consequence of it.

At the same time, that does not altogether free us from difficulty in this case. I think the public prosecutor has done every thing which technically he was bound to do. He was bound to state the specific charge against the prisoner. He has fairly cited the clauses of the act of Parliament. In the minor, he has stated all the facts consistent with his knowledge. I at first thought he ought to have done a little more, though I now incline to think he was not bound to do more. The crime consisting in administering an oath purporting or intending to bind to commit treason, the public prosecutor could not allege that the oath applied, at once, to all the classes of treason. The statute applies to the whole range of treasons; but, when any individual oath comes under consideration, the prosecutor might state the particular species of treason apparently contemplated. I came to this conclusion the more readily, that this was just the process of reasoning by which I came to be satisfied, that the oath is within the act of Parliament. When I read the oath, and reflected what was the crime intended to be committed, unless I had been satisfied that the parties were bound to commit some individual kind of treason, I could not have been satisfied that the act applied to the case. I read the oath, I then reflected what would have been the crime if the oath had been acted upon. I thought the fair inference from it was, that those who took it bound themselves to commit treason, by levying war against the King. Therefore, I first thought it was the duty of the public prosecutor, if he followed the same train of reasoning I did, to state the result of that reasoning; but though this might have been done, I now think, it is not required to be done in the technical formation of an indictment on this statute. This is a statutory offence, and the public prosecutor is not bound to be more specific than the statute itself is. In the minor proposition he states all the facts within his knowledge, and is not bound to state every inference that occurs. I should have liked the indictment better, if it had stated the species of treason in view; but I cannot think it irrelevant on account of its not having done so.

The objection at best is merely technical; and the public prosecutor has not failed to do any thing he was technically bound to do.

The only other question is, how far the felony merges in the treason. By the common law of England, if I understand it, the inferior always merges in the higher denomination of crime. Trespass is drowned in a felony, and on the same principle felony is drowned in treason; and there is nothing peculiar to the law of treason in this respect. On the other hand, it is clear, that the law of Scotland is directly the reverse. There is no such merging in our law, of the inferior in the higher crime; and the public prosecutor may always choose which he pleases; he may take either the lower or the higher species. (Hume, vol. iii. p. 276.) It is easy to see the reason of this difference between the practice of the two countries. In the one country, there is a public prosecutor, and in the other none. I shall not say which institution is best; both are well administered, and answer well the purposes of justice.

There are two questions which naturally arise here. The first is, whether the common law of Scotland, in this respect, was put an end to by 7. Queen Anne, c. 21. Into this point, I do not think myself bound to go at great length, as the act of parliament on which the indictment is founded, fixes the matter as to this indictment. With all Mr. Grant's ingenuity, however, he has not convinced me that the common law of Scotland here is put an end to. Its preamble proceeds on the expediency, "that the laws of both parts of Great Britain should "agree as near as may be, especially those which relate to "high treason, and the proceedings thereupon; as to the na-"ture of the crime; the method of prosecution and trial; and "also the forfeitures and punishments of that offence, which "are of the greatest consequence to the crown and the sub-"ject." It then enacts, that the same acts should constitute high treason in both parts of the kingdom, and provides for the appointment of a court of oyer and terminer for trial of high treason in such manner as is used in England.

Is this to be held by implication, to put an end to a common law principle previously existing, of the public prosecutor having his choice of charging the higher or lower denomination of offence as may appear to him to be proper? I am not prepared to say so.

I felt more difficulty from Mr. Grant's able and ingenious commentary on the third clause of the act, which provides, that "the justice-court, and other courts having power to judge "in cases of high treason, and misprision of high treason in

" Scotland, shall have full power and authority, and are here-
" by required to inquire, by the oaths of twelve or more good
" and lawful men, in the shire or stewartry where the courts
" shall sit, of all high treasons, and misprision of high treason,
" committed within the shires or stewartries; and thereupon
" to proceed, hear, and determine the said offences whereof any
" person shall be indicted before them, in such manner as the
" court of Queen's Bench, or justices of oyer and terminer in
" England may do."

If I had understood that, in consequence of this clause, part of the power of the public prosecutor was conferred upon the Court of Justiciary, to find out when treason is committed, and not merely to judge of cases coming before them, then I should have thought our judges should proceed as the English judges are said to do. But I do not understand this to be the meaning of the clause, but that it is merely following out the first clause, establishing the same form of process in the two countries. I do not think it would entitle us to quash an indictment, or discharge a jury once impannelled, as Judge Foster says he would have done, so as to make way for a second trial for the same facts, under the denomination of treason; and, I do not think it is to be implied from the statute, that the public prosecutor's power of choosing his libel is taken from him.

But, in the *second place*, the case here is simple, and all difficulty is removed by the act of parliament on which the indictment is founded. I am not able to appreciate the value of all the authorities quoted by Mr. Grant on this branch of the case. I am bound to understand them as well as in my power; but, I must admit, I have not been able to go far in an examination of them. They seem, however, to amount to this, that an exception to the common law is not to be extended beyond the letter, and that this holds particularly where the law is taking away something favourable to the subject. I am willing to hold that the statute upon which the indictment is founded, shall not be held *by implication* to make any change in the law on this subject; but, at the same time, its terms must be attended to, and fair play given to them. When I look to the enactment, it applies to *any* treason. It is " any " oath or engagement, purporting or intending to bind the " person taking the same to commit any treason," &c. It is by implication only that I am to exclude the obligation to commit any species of treason where the obligation comes up to treason itself. The oaths are all stated as of one description, and as coming under the act.

But this is not all. It is not merely left to implication.

The statute § 8. has evidently in contemplation that the same facts which should give rise to a prosecution under it, might, independent of the statute, have been treason itself, so that though felony merge in treason in common, this cannot be held in such a case as the present. It provides "that any "person who shall be tried and acquitted, or convicted of any "offence against this act, shall not be liable to be indicted, "prosecuted, or tried again for the same offence or fact, as "high treason and misprision of treason."

I cannot suppose the act here means any thing, but that a party might be *legally* acquitted or convicted *under this act*, who, but for this act, might have been tried for treason. It is declared that if tried under this act, he cannot be tried as he might otherwise have been. The legislature was aware that an offence under this act might be treason independent of it.

The same observation applies to the other branch of the clause "that nothing in this act contained shall be construed to "extend to prevent any person guilty of any offence against "this act, and who shall not be tried for the same as an of-"fence against this act, from being tried for the same, as high "treason, or misprision of high treason, in such manner as if "this act had not been made."

The legislature was afraid that it might be held that, if any person had been guilty of what is described as criminal in the act, it took away the power of charging the same as treason, and it does not say that a guilty person shall not be tried otherwise than under the act; but that if he have been tried under the act, he shall not again be tried in any way for the offence. The legislature thus guarded against the inference that the power of the prosecutor to choose his mode of trial was taken away; and also provided, that no repetition of trial should take place in any form, for an offence as to which a person has once been acquitted or convicted. It is clear to me, therefore, that the legislature had in view, that the same act might be a subject for trial under the statute, and likewise a subject for trial as high treason; and that therefore, here at least, felony *does not* merge in treason.

Lord Justice-Clerk.—I am as fully convinced as any one of your Lordships can be, that, in considering the indictment in this case, we are called upon to perform a most important and delicate duty. Important and delicate, I feel it to be, in reference both to the pannel at the bar, and to the public at large. I am as much impressed as my brother on my left hand, (Lord Gillies,) by the situation in which the Court is placed, from the necessity which is imposed upon

us of deciding on the relevancy of this indictment; but, as this necessity is one imposed upon us by the law of the country, to which we are bound to give obedience, it is impossible for me, for one moment, to hesitate or shrink from the performance of that duty. Looking to nothing but the discharge of my duty, I am at all times prepared to perform it conscientiously, whatever may be the consequences.

The indictment in this case is the first which has been brought before this Court, on the statute 52d of the King; and, considering the ability, the ingenuity, the intelligence, and the learning of those, who, in this case, have rendered their united services in support of the defence of this unhappy man, it is not surprising that objections have been stated to this charge, both with regard to its essence, and to the form and character of the indictment. Those objections have been made the subject of most eloquent and learned *viva voce* pleadings; to which it is impossible to do justice without declaring, that, in point of ingenuity and ability, they have not been exceeded at any period of the history of this Court. The argument appeared to your Lordships, in reference to the nature of the case itself, to be of such grave and weighty importance, as to deserve to be embodied in informations. These are now before us; and as to the ability and learning with which they have been prepared, I entirely concur in the opinions which have been expressed by your Lordships.

The objections are of a fourfold nature. I shall mention them in the order in which they are presented to us in the informations, though, in delivering my opinion, I shall feel it my duty to proceed, in the *first* place, to the consideration of the *third* of these objections.

The objections are, *first*, that in this case, founding upon this act of Parliament, it was necessary for the public prosecutor to specify, in his indictment, the particular treason which he alleges the oath purported or intended to bind to commit. In the *second* place, that, whether this be his duty or not, he has undertaken to perform it, and has done it in an imperfect manner, having specified and defined no treason that is known in this kingdom. The *third* objection is, that the oath itself is not one which comes up to the sanction of the act of Parliament, or which you can sustain as sufficient in the minor proposition, and remit to a jury. The *fourth* and last objection, and which has been brought before us in an able, perspicuous, and argumentative manner, is, that supposing the pannel wrong in these three objections; and taking the case as submitted by the public prosecutor, the principle

that felony merges in treason must apply to this case, with all the consequences which would attend it in England.

I shall proceed to consider the *third* of these objections, because it must be obvious to all of your Lordships, that, if the oath, which is the whole essence of the charge before you, be not of the description which the public prosecutor avers, namely, an oath purporting or intending, in itself, to bind to the commission of treason, all the other inquiries are superfluous, and it would be unnecessary to consume your time with any consideration of them.

In considering the meaning of this oath, it is proper to keep in mind, that the act of Parliament upon which the indictment is laid, and on the terms of which alone it is rested, was preceded by the statute 37th of the King. The words of that act are before us. Your Lordships will see, that, for the purpose of preventing the evils which then existed in the country, that act was passed, declaring that the administering or taking any oath "purporting or intending to bind the per-"son taking the same, to engage in any mutinous or sedi-"tious purpose; or to disturb the public peace; or to be of "any society or confederacy formed for any such purpose, "&c. should be held to be a felony punishable with transpor-"tation for seven years." This statute, the 37th of the King, had, till the year 1812, been considered by the legislature as sufficient to meet the evils intended to be remedied; but it so happened, that, in 1812, proceedings took place in England, in the very heart of this kingdom, of such an alarming complexion, as to call for the deliberate attention of Parliament; which was then led to consider the existing state of the law, and provide a remedy for the public safety. The act, the clauses of which have been referred to in this indictment, was accordingly passed, proceeding on the preamble, that "it is expedient that more effectual provisions should be made "as to certain oaths." This is the way in which the statute under consideration was introduced, and made a part of the law of the land. The act proceeds, "Be it therefore enacted, "&c. that every person who shall, in any manner or form "whatsoever, administer, or cause to be administered, or be "aiding or assisting at the administering of any oath or en-"gagement, purporting or intending to bind the person "taking the same to commit any treason, or murder, or any "felony punishable by law with death, be adjudged guilty "of felony, and suffer death as a felon, without benefit of "clergy," &c. The indictment, after reciting this and other clauses, proceeds to state, that the pannel is guilty of the said crimes, or of one or more of them, actor, or art and

part; and it goes on, in the usual, regular, and technical mode, to set forth the oath, which the pannel is averred to have administered, at secret meetings, to a great number of persons, amounting to several hundreds; and which oath the prosecutor avers to be an oath "purporting or intending to "bind the persons taking the same to commit treason, by "obtaining annual parliaments, and universal suffrage, by "physical strength, (or force,) and thereby effecting the "subversion of the established government, laws, and con-"stitution of this kingdom, by unlawful and violent means." Your Lordships are therefore under the necessity of giving your opinions, whether this fact, which is so set forth in the minor proposition—the act of administering a certain oath, at the particular times and places therein mentioned, and to the individuals alleged to have taken the same, and, with regard to which, the public prosecutor undertakes to satisfy you and the jury, is conform to the major proposition—and is, or is not, of the description given of it by the public prosecutor.

In determining this question, I think it right to say, I am of the opinion expressed by your Lordships, that, by the words of this act of parliament, as well as in reason, and according to the rules of the common law applicable to such a case, it is only to the words of the oath itself we have to attend; and that we are not in a question as to the purposes or intentions of the administrators, or takers of the oath, in so far as they cannot be made to appear upon the face of the oath itself. As to the assertion, that it was administered to numbers, and at secret meetings, upon that part of the libel I concur with the able argument for the prisoner.

It appears to me necessary to come to a clear understanding of the rules of interpretation, which we are to apply in entering upon this inquiry. I am of opinion, that it is not by far-fetched, abstruse, intricate, or subtile rules of construction, your Lordships are entitled to judge of the meaning of this oath. You are to put upon it the plain meaning which the words, in which it is conceived, would have conveyed, and must be held to have conveyed to persons of plain understanding, dealing with that oath. I am further of opinion, that you are not entitled to listen to refined criticisms on the terms of the oath; and far less to listen to any allegations that mere suspicion or conjecture might offer as to what was the real object of such an oath.

It appears to me, however, to be indispensable, that the whole of the oath, from beginning to end, should be taken

into consideration. We are to take, not a detached part of this oath here and there, and extract a meaning from it—we are to combine the whole of it, and take it as one single instrument, and put upon it merely a plain, common sense, legitimate meaning, laying aside every thing like refinement in extracting what is its true import.

I feel myself bound, where the oath may be of a doubtful or uncertain nature, to let the doubt lean in favour of the accused; but, on the other hand, if the words be plain, and convey only one meaning to my mind, I am called upon to give effect to that meaning, without paying the slightest regard, on the one hand, to its bringing the prisoner, within the law; or, on the other, letting him escape, if he was truly guilty of a violation of it.

Keeping these considerations steadily in view, and taking the whole instrument into consideration, I agree with my brother on my right hand, that, in looking to what is the true purport or intention of this oath, particular attention must be paid to the solemnity with which it is introduced and concluded. An invocation, in the most solemn manner, to the Almighty, is the commencement of the oath; and the conclusion is, "So help me God, and keep me stedfast." A more solemn and deliberate call upon God, in entering into an engagement; one which is attended with every thing that can render it awfully impressive on the minds of administrator and taker than this, it is impossible for me to figure to myself for a single moment.

The oath then proceeds, "I will persevere in my endea-"vours to form a brotherhood of affection amongst Britons "of every description, who are considered worthy of con-"fidence." That this brotherhood which the taker of the oath binds himself to persevere in endeavouring to form, can, upon any fair or legitimate principle of interpretation, be supposed to allude to the case of such a brotherhood of affection as was ingeniously put to your Lordships at the *viva voce* discussion of this case, appears to me to be negatived by another part of the oath, which refers to the penalty for the disclosure of any thing done by the brotherhood. For these two passages taken together must satisfy every fair, candid, and impartial mind, that it was the formation of brotherhoods, associations, or bodies of men united together for one common purpose,—not a brotherhood of affection among all mankind in general, or all the people of this country in general, but among those only who are considered *worthy of confidence*. Look to the subsequent part of this oath; to the sanction of secrecy as to the pro-

ceedings; the punishment of death, to be inflicted by any member or members of such *societies;* which affords the clearest evidence that there was to be a union of numbers; that these numbers were to be united together in a variety of different societies; and then say if it is possible, in common sense, or giving fair play to language, to suppose a brotherhood, with innocent purposes, was really in view? There is a positive obligation to form an union of individuals, composing different societies, linked together in this solemn and deliberate manner; it is therefore quite impossible to suppose a brotherhood of affection was alone intended.

The obligation of secrecy, of absolute concealment of every thing that was to be done, of every description whatsoever, in or out of these societies, is a most remarkable feature of this oath; and I have no difficulty in stating, that this has appeared to me, from the very first moment I deliberately considered it, to be one of the fairest and most unexceptionable tests in order to ascertain what is the true purport or intendment of this oath. The words are, "And "I do further swear, that neither hopes, fears, rewards, or "punishments, shall induce me to inform on, or give evi- "dence against, any member or members, collectively or "individually, for any act or expression done or made, in or "out, in this or similar societies, under the punishment of "death, to be inflicted on me by any member or members "of such societies." Suppose an oath to have been administered, containing in it nothing but what I have now read, and without its having disclosed upon the face of it the object of such secret associations as are here linked together, is there any one of your Lordships who would not have pronounced it to be a criminal oath, and inferring a criminal purpose in the view of both administrator and taker? I apprehend that not a shadow of doubt could exist upon the point.

But we are at no loss to discover what was the object this oath contemplated. For, after providing for the formation of this brotherhood, your Lordships know in what manner the objects of the union are disclosed in the passage so often read, relative to the engagement to persevere in endeavours to obtain the elective franchise to every person in Great Britain and Ireland, not disqualified by crimes or insanity, and annual parliaments:—"and that I "will support the same to the utmost of my power, either "by moral or physical strength (or force), as the case "may require." In putting upon these expressions the

meaning which fairly attaches to them, it is impossible for me to bring my mind to the interpretation which has been endeavoured to be impressed upon your Lordships—that this engagement to use physical strength, or force, is referable merely to the securing of annual parliaments and universal suffrage after they shall be obtained. It is impossible, upon any principle of construction that I am acquainted with, to put this forced and unnatural meaning upon these words. I, on the contrary, must infer this engagement to mean, that all endeavours, by moral or physical strength, were to be employed to obtain these objects, as the case might require. But even if another construction was adopted, namely, that the above mentioned words were to be held to refer to the whole preceding members of the oath, then, as there is no limitation, no confinement of this co-operation of efforts to any of those which are called innocent proceedings, your Lordships must still be left to draw the same conclusion of physical strength, or force, being pledged to be resorted to, as the case might require. It is manifest, on the words of the oath, that the party administering, as well as the party taking it, had their attention most particularly called to the distinction between the two kinds of strength, or force, that are here to be resorted to. This is marked in the most emphatic manner by the words, "*as the case may require*;" the obligation being to use the one, if the case required only that one, but to betake themselves also to the other, if the case should require its aid.

Putting upon these words, then, the only interpretation they can justly bear; holding there is no room for the innocent construction that has been pressed upon your Lordships; and taking into view that the oath binds numbers to the obligation in question; that it is averred that it was administered to great numbers; that various societies were in contemplation; and, above all, that the clause of concealment to which I formerly alluded, has a direct reference, not only to *expressions* made use of by any member or members, but to *acts* done by them "in or out of this or similar societies;" the conclusion cannot be avoided, that it was in regard to the endeavours to obtain their objects, that recourse was to be had to moral or physical strength, as the case might require. If there was, therefore, in the preceding parts of the oath, any doubt, any ambiguity, any difficulty whatever, your Lordships have it completely removed by this most remarkable and emphatic part of it. Indeed, I well recollect, that the good

sense of the senior counsel for the pannel, while he was endeavouring to give his view of this part of the case, prevented his grappling with this part of the oath, which he admitted, in unqualified terms, (and in so doing he has been followed by the learned counsel who draws the information for the pannel,) did contain criminal and dangerous matter. But, I apprehend, this most dangerous and criminal part of the engagement, is that which your Lordships may justly resort to as a test for trying the other parts of it, if there does exist any difficulty in regard to their true meaning. This passage of itself goes far to remove any doubt which could exist as to the criminality of this oath. When was it ever heard of, that an obligation to perform only innocent acts, to engage in nothing but lawful proceedings, was enveloped in such terms as we have here; and that the mere performance of the bounden and sacred duty of every member of this association, who might be called upon in a court of law to disclose the truth, was to be followed with the punishment of death? That the obligation must be held to attach even to the persons who should give evidence in courts of justice seems clearly evinced by the words used. A more tremendous obligation can hardly be conceived, than that of binding a person by a solemn oath, not to give evidence as to the proceedings of an association, under the penalty of being murdered by any of its members. That part of the oath alone, therefore, renders it altogether impossible to doubt as to its purport and intendment being of the most criminal nature.

If this be the conclusion which, upon a careful consideration of this oath (and sure I am, no case ever met with more anxious attention) we must come to, the next question is this, whether an obligation such as this, to resort to the use of physical strength or force, in endeavouring to obtain annual parliaments and universal suffrage to the subjects of this country, does come up to what the indictment states it to be,—an oath or engagement purporting or intending to bind the taker to commit treason?

I take this opportunity of stating, that the view which I have taken of this case, is the same that it would have been, had this oath been presented to your Lordships in the shape which it first assumed. I concur in opinion with Lord Pitmilly, that the use of the words physical strength, in the clear and marked manner in which it is manifestly to be employed on the face of this oath, would have been sufficient to satisfy me as to the purport of the

oath, independently of the addition of the word *force*. But, at the same time, I agree with my brother on my left hand, that if there be any doubt as to the word strength, it is entirely removed by the word force being used promiscuously in one and the same sense.

That universal suffrage and annual parliaments make at present no part of the constitution of this realm, (and that they may make no part of it till the end of time, must be the devout wish of every man who has the interest of his country at heart!) is a proposition which cannot be disputed for a single moment. That the obtaining and accomplishing these objects, by the use and application of physical strength or force, by numbers united, and associated together by such an obligation as is now before us; that the effecting, by such means, the establishment of universal suffrage and annual parliaments, and, consequently, overturning the present constitution of the kingdoms, would clearly amount to high treason, I presume no man breathing can doubt.

That the obtaining of an alteration of law by numbers, and the employment of physical strength and force to accomplish it, does constitute high treason, none of your Lordships, or any one acquainted with the law, can hesitate in believing. The authorities on this subject are distinctly brought before your Lordships in the information for the public prosecutor, p. 10, 11. You there find cited the authorities of Hale, of Foster, and of Lord Mansfield, in announcing the law in the case of Lord George Gordon; which authorities have since been referred to by every judge who has had occasion to address a jury in any charge of treason, and their opinions, I will say, (although a slight was thrown out as to the weight due to him,) have been in a most accurate, satisfactory, and lawyer-like manner, summed up by Mr. Hume. Looking to these authorities, there cannot be the slightest doubt, that to accomplish such objects as we are now considering, by means of numbers and physical strength, would be high treason, as an actual levying of war against the King—in the words of Judge Foster, who will be admitted to have given a correct account of the law of treason. That these objects are of a public and general nature, cannot be questioned; and that the accomplishment of objects, which are of that description, and not private, if sought to be brought about by a rising of persons, and the application of force, even without any of the pageantry of war, is high treason, and a levying of war against the King, is the

united import of all the authorities which have been referred to; no lawyer having, indeed, ever doubted that the rising of a number of persons for effecting public purposes by force is high treason and levying war.

As this oath contemplates events to be accomplished—acts not doing or done, but to be committed—which would amount to high treason, I think your Lordships, in considering the import of it, are bound to look to the consequences, as demonstrating what it purported or intended to bind to. Having said this, I must take leave to say, that I am not in the slightest degree conscious, that, in holding this opinion, I am about to establish any new treason—that I am giving any countenance to the establishment of constructive treasons—or that I am transgressing any decision of Parliament or courts of justice—a hint which has been held out, as if *in terrorem*, to your Lordships. I am persuaded, that the learned gentlemen who have resorted to this mode of argument, did not purport or intend to make the allusion by way of warning to your Lordships, or to convey any thing like a supposed picture of the consequences that are likely to follow from the decision we may be called upon to pronounce: If I were capable of thinking such was the object of the quotations I allude to, I can only say for myself, that I should have treated them with the scorn and contempt they deserve. Sitting here, in the discharge of a most important and delicate function, I know the duty I have to perform. I have to perform it according to my conception of the rules of law, and the conviction of my own conscience; and I do so without the slightest regard to those consequences which may be supposed to be alluded to in the passage to which I refer. But I must do the gentlemen the justice to suppose, this was stated without any such view. But, having heard it also in the *viva voce* pleadings, I have felt it incumbent on me to make these observations. If any man can persuade me, by sober and legal argument, by a reference to authorities to which I am bound to pay obedience, that the opinion I have formed has a tendency to establish a treason, by ambiguous and general words, "as accroach-"ing of royal power, subverting of fundamental laws, and "the like," I would listen to the argument. But I just say, in one word—Let that man show me, upon the authority of any judge or lawyer in England, that what was manifestly intended to be done on the face of this oath—the altering the established laws, and constitution of Par-

liament, by physical strength or force—if accomplished, is not high treason, and I will give the authority obedience.

If such then be the true import of this oath, the question remains for your Lordships to determine, whether the public prosecutor, resting his charge on the act of parliament, and subsuming in the minor proposition that the pannel is guilty of that charge, by administering this oath to a variety of persons, on various occasions, and at secret meetings—has shaped the indictment in such a manner as to warrant us to remit it to an assize?

This leads to the objections alluded to, that it was the duty of the public prosecutor, to define the treason which he alleges the purport of the oath was to bind to commit; and that the attempt he has made to do so is abortive.

In reference to these objections, if it were at all true, as is stated in the information for the pannel, that the prosecutor is here asking to obtain the chance of a verdict from a jury, upon vague inference from facts inapplicable to the nature of the charge, and without fully explaining himself to us or the jury, it would be the duty and instant inclination of your Lordships to check such an attempt. You are bound to take care of the interest of the public at large, and of the party accused, by checking such attempts, and finding the charge irrelevant. But the facts of this case, as appearing on the face of the indictment, warrant no such assumption.

I think it necessary to notice, that I cannot concur in one position of my learned friend who drew the information for the prosecutor—that, in a case of this description, we can give any credit to the public prosecutor as to the meaning of the oath, unless we be satisfied ourselves, upon the face of the oath, that the meaning which he states is correct. If such be his statement, I beg to say I differ from him. In the major proposition of the indictment, reference is had to the act of parliament; and it is for us to say, whether the facts stated in the minor proposition come up to the major proposition.—I see, however, the public prosecutor does not mean to carry his argument to that length.

But, supposing the objects of the parties to the oath were to be prosecuted by levying war, it appears to me, that, in order to make a relevant charge, it is not necessary, on any principle of law, nor is it required by this statute, that the public prosecutor should enter into a definition of the precise treason which he avers the oath purported or intended to bind the parties to commit. I say so, under this qualification, that he must aver and show, on the face of the oath, that it purports or intends to bind to commit treason.

I cannot enter into the idea, that, to found a legal charge under this act, which refers to three distinct species of oaths, binding to commit any treason or murder, or any felony punishable with death, it would be sufficient to narrate the act, and not say whether the oath bound to commit some particular one or other of these species of crimes. I am for the prisoner, as to this point; and I think, on the principle of fair dealing, the species of oath imputed to him, should be distinctly stated. But, having arrived at that conclusion, I am then to say, whether or not there is any thing in the nature of this act of Parliament, and charge that is made under it, which requires the prosecutor to go farther. I must beg leave to say, with all deference to the opinion of my brother, (Lord Gillies,) that it is possible to figure cases of oaths upon which charges under this act might accurately be laid, and as to which it is impossible to contend that the public prosecutor is bound to specify and define the treason. I allude to an oath which professes to have in view, any alteration of the law, for instance. If such shall appear to be the object of the oath, and there shall be, on the face of it, words which clearly purport or intend to bind the taker to persevere in the accomplishment of the object by any means whatever, and to persevere even in *treasonable* means if necessary, I contend, that it would be sufficient for a prosecutor to say here is an oath in violation of the statute 52d of the King, intending to bind the takers to commit treason. I take for granted, that the oath binds to persevere, by the use of all means, not excepting treasonable means. Could any man doubt, here is an oath in violation of the act of Parliament? Then I ask, what is the duty the public prosecutor is called on to perform?—To define the treason which the party at that time taking the oath had not at the time himself defined? He had merely bound himself to the performance of treasonable acts, which is a violation of the act of Parliament. In this instance, it is an absolute impossibility to say a correct special definition of the treason could be given. I always say this, under the qualification to which I formerly alluded, that the oath itself shall be one which purports or intends to bind to the commission of treason at least. If it were couched in such language as no mortal could understand, it would be just to hold it not sufficient that the prosecutor thought it bound to commit treason; but if this appears on the face of the oath itself, the charge must be held to be relevantly laid.

I go a little farther; for it is not merely in reference to treasonable, but to murderous, and felonious oaths, that this observation would be found strictly to apply. I take the case

of an oath, as was put by Lord Pitmilly; not that there is an obligation on the face of it, to murder an individual, but to preserve secrecy, and to persevere in endeavouring to accomplish certain objects, and even to put to death all those who should oppose the accomplishment of them. Here is an oath which might be charged as in violation of that part of the act of Parliament directed against oaths purporting or intending to bind to commit murder. The prosecutor quotes the oath, which contains such an engagement as I have stated, to persevere, even to the risk of putting to death, those who shall oppose the accomplishment of the end in view. If the prosecutor were called on to define the species of murder which this oath purported to bind to commit, would there not be the same impossibility attempted to be imposed as in the case formerly supposed, as to the species of treason? The parties themselves had not designated whom they intended to murder, or the manner of doing so, except generally those who should oppose them; and therefore the public prosecutor could not describe, in the charge, the particular sort of murder, as that does not appear on the face of the oath itself. But, if he narrates the act of Parliament, and cites the oath, he does all that is incumbent upon him under this act of Parliament. I say the same as to an oath binding to commit felony. Suppose parties (and nothing is more common, I fear, than associations in some parts of the kingdom, of persons to commit felonies,) enter into a combination to commit a capital felony, and have resorted to an oath binding themselves to seize on the whole bullion in the coffers of the bank of England, or to possess themselves of the regalia in the Tower of London. The prosecutor discovers such an oath, and libels upon it as purporting or intending to bind to commit a felony punishable with death. I think, on attending to this act of parliament, and to the circumstances under which such an oath must have been administered or taken, it would not be necessary to specify and define the obligation as one to commit the crime of burglary, or any particular capital felony; and, if such a charge was raised here, it would not be necessary to state that the objects were to be accomplished by means of theft and house-breaking. It would be sufficient to state, that the act of Parliament was violated by such an oath, bearing on the face of it an obligation intending to bind to commit a felony punishable with death. The prosecutor cannot be called on to define more precisely, what it must be impossible for him to do.

If the oath itself bears the construction which is alleged of it, and if the relative circumstances of time and place of ad-

ministering be set forth in the indictment, the prosecutor has done all that is necessary for the advantage of the prisoner. The prisoner suffers no harm from its being stated in the indictment, that it is an oath intending to commit treason, for, if he can shew that such is not the proper construction of the oath, and that it does not so purport, his defence remains entire. That he suffers no hardship from the indictment being so framed, appears to me to be quite clear. An admission was made on the part of the pannel at the bar, in clear terms, by Mr Moncrieff, that this indictment would have been relevant if it had narrated all the different treasons alternatively as bound by the purport of the oath to be committed by the takers of it. This is a truth of which I have no doubt whatever: But, if so, is it possible to say any benefit would have resulted to the pannel from following such a proceeding?

But, it has been said, that, *esto*, it is not incumbent to define the treason in an indictment on this statute; yet the prosecutor has undertaken the task, and has not performed it satisfactorily.—Now we are all agreed, that, in a trial for treason, the particular species of it must be specifically set forth; but, I conceive, for one, that the present objection for the prisoner proceeds altogether on a mistake, and that there is no such thing, as is alleged, undertaken on the part of the public prosecutor. The passage founded on, is not to be found in that part of the indictment where you would have expected the prosecutor to have made such a charge. The words termed vague and unsatisfactory, are merely expressive of the prosecutor's opinion as to the nature of the oath; I shall not fatigue your Lordships by reading that part of the indictment—I refer to it as familiar to all of your Lordships. The prosecutor goes on to describe the oath as an obligation to obtain annual parliaments and universal suffrage, by physical strength or force, and thereby effecting the subversion of the government, laws, and constitution of this kingdom, by violent and unlawful means. This is clearly descriptive of the oath, not of the treason; for there immediately follows: "Which oath "or engagement, or obligation in the form of an oath, was in "the following terms." On this part of the case, it is obvious to me, that that which is alleged to have been an imperfect execution of a task undertaken by the public prosecutor, falls entirely to the ground; for the public prosecutor has not entered into any such undertaking—he disclaims it; and the words of the indictment show he had not pledged himself to any such task. Agreeing, therefore, with the counsel for the pannel, that, if this were a trial for treason, those words in the indictment would not be sufficient; I say, the

rule requiring a specification of the treason, does not apply to the present case, and has not been attempted to be acted upon by the public prosecutor. The case is quite different from that of Lord Strafford. Without at all interfering with the law of treason, or asking us to find the indictment relevant, as charging treason, the public prosecutor makes the averment, that the oath here is one purporting or intending to bind to commit treason; and he says it was so by obtaining annual parliaments and universal suffrage by physical strength or force. This is his description of the oath, and we are referred by him to the oath itself; and if we are right in our construction of it, it is an oath purporting or intending to bind to commit treason, because it states that physical strength or force was to be employed in the accomplishment of those objects; which never can be accomplished without producing those consequences which the prosecutor states. Those words of the indictment are no more than the enlarged view the prosecutor gives of the consequences of his averment as to the nature of the oath itself. That they are not descriptive of the means to be employed, is obvious. Neither are they descriptive of the objects in view; for these are annual parliaments and universal suffrage. They are no more than an amplified detail of the evil result of the accomplishment of those objects, which cannot take off the effect of the treasonable nature of the oath. That the words, "and thereby effecting the sub-"version of the established government, laws, and constitu-"tion of this kingdom, by unlawful and violent means," cannot therefore be viewed as any thing like an attempt to define the treason, is to me quite obvious. Suppose the indictment had specified the treason of levying war, and then these words had followed, "and thereby effecting the sub-"version of the established government, laws, and consti-"tution of this kingdom, by unlawful and violent means;" will any one maintain, that the addition of these words, which are merely descriptive, could vitiate the rest of the indictment? That view of the import of these words is decisive, that the use of them in this case cannot amount to a vitiation of the charge, or render it in any respect irrelevant.

In all cases of this nature, it is right for the public prosecutor to deal fairly with the accused, and to put him in possession of what he bottoms his charge upon, specifying the time, manner, circumstances, and individuals, with regard to which the guilty acts are said to have been committed. When I look to this indictment, I find all this is done. The major proposition cites the act of parliament. It is

then charged, that the pannel was guilty of having administered an oath, the terms of which are set forth; the places, persons, and nature of the meetings at which it was administered are detailed; and the prosecutor having done this, has done all that can be demanded of him, according to any principles with which I am acquainted, for the formation of a criminal charge.

But, there does remain another objection which has attracted the attention of all of your Lordships, as brought under our consideration in an argumentative and learned manner, in a supplementary information for the pannel. I have no inclination to find any fault with that course of proceeding; for, it was otherwise impossible to do justice to that argument, because it proceeds on the supposition that the other argument had altogether failed. But I have humbly to submit to your Lordships a view upon this part of the case, which has not been taken by any of the Court, and which has appeared to me, on a thorough consideration, to be deserving of great attention. For, independently altogether of the weight of the answers which have been made to the preliminary objections, it is obvious that Mr. Grant's argument is bottomed on assuming this fact, that the administration of the oath itself, now before your Lordships, does amount to an overt act of treason under the statute 36th of the King; that it is an overt act of that particular treason of compassing or imagining to levy war for the purpose either of compelling the King to change his measures, or to over-awe either House of Parliament; and that administering to numbers at secret meetings such an oath, is to be held as a substantive overt act of this particular treason. Before I can, however, arrive at this conclusion, it must be made out to me, in a more satisfactory way than has hitherto been done, that, by giving my sanction to this assumption, I am not in fact proceeding to establish a constructive treason. Your Lordships will perceive, that what I allude to is this, that it is indispensably necessary, to the permitting such an oath as this to be received as an overt act of the particular treason to which I have referred, under the statute 36th of the King, that the conspiracy, the compassing, imagining, and devising to levy the war should be matured and specially directed to the levying of war, at a certain time, and at a certain place, and for a certain special purpose, such as the objects stated in this case—the obtaining annual parliaments and universal suffrage, or any alteration of the law. This to me is clear from the principles we find applied to the

statute of Edward III.; that, before any particular fact shall be founded on as an overt act of a compassing and imagining the death of the King, or levying war, it is necessary to make out satisfactorily that there was such a conspiracy devised and matured. This is a clear principle in the law of treason, and I shall be the last man to interfere with it. To make his argument on this point apply to the present case—to entitle him to raise the question whether we can in this way try what is in itself *a treason*, it is incumbent on the pannel at the bar to assume it as proved, that there was this matured, specified, fixed, and deliberate conspiracy and plan formed to levy war. This he must assume, before he can avail himself of the argument which his counsel has suggested. It is material, however, to observe, that the indictment does not state this to be the fact; and, I ask, whether there is any one of your Lordships, upon the principle which has been so strongly impressed upon you by Lord Gillies, who can take this important fact for granted? I, for one, am not prepared to do so. In my conscience, I am bound to say, that though there appears on the shewing of the indictment to have been in contemplation, that which, if accomplished, would have amounted to high treason, I must give the parties credit in believing, that there was not a digested, specific, deliberate, fixed plan for a rising. And, having that clear opinion, and having seen nothing to shake it, the whole basis of the argument in this part of the case falls to pieces, and there remains no foundation for stating, that you have here an oath founded on in support of a charge of a capital felony, which is itself an overt act of high treason.

The object of the statute of the 52d of the King, was to guard against the state of subserviency and subjection of men's minds to the influence of leaders, some of whom were even concealed from the persons who were concerned, both in taking and administering these oaths. It was to prevent the consequences of such dangerous influence over the minds of the people, and of their blind submission to these leaders. It contemplates, therefore, the cases of prospective conspiracies not yet matured, not brought into the shape of actual concert of rising into rebellion. It was to guard against those evils that the act was framed. It has a reference to what is *to be* committed, not to what *is* committed. If this be a correct view of the true intent of the act in question, that it was made to prevent the creation of such undue influence, and the subjection which seems to have been the object of the administrators in regard to those who took the

oath; then it follows, that it is relevant, in forming a charge under this act, for the public prosecutor to set forth that this is an oath purporting or intending to bind to commit treason, in violation of the act of Parliament. But, being of opinion, that it has not been made out in a clear, and satisfactory manner, that the administering of this oath, as charged in the indictment, is an overt act of the nature taken for granted in Mr. Grant's argument, I have here nothing to do with the proposition that felony merges in treason, even if there were no such clause as the last one of the statute in question.

As to the doctrine in general, that, without precedent, case, or opinion of any lawyer of authority, it is to be held at once and decided in this case, that, by the act of Queen Anne, which renders the law of treason the same in both countries, we have imported the whole principles of the common law of England in reference to such a crime, it is a proposition to which I am not prepared to accede. Your Lordships have already seen one marked distinction between the systems of the law of the two countries, which renders it impossible to hold, that the whole law of England has become a part of the common law of Scotland. I should have wished to have heard any authority given to your Lordships, from which it could possibly be held that any Judges who ever sat in this Court, could permit any man who has been sent to an assize on a charge of crime founded on an allegation of certain facts, to be remitted on the same facts to another assize, to be tried for a crime of higher denomination, without the express authority of parliament? I never can go any such length. This is one feature in our law which must show that we have not yet embodied into it the rules of the common law of England. It is clear, from Foster, that, if in the course of an investigation, as to a trial for felony, he, as a judge, should discover treason, he would discharge the jury, and direct a new indictment for treason to be raised. Such proceeding is, however, impossible, according to the law of Scotland. No instance of it has been produced to your Lordships—no authorities have been founded on to establish such a rule; and I am certainly not prepared to adopt it here. If I understand the principle, it goes to the length that a judge should discharge the jury, whether they were about to convict or acquit the pannel. That we should adopt so extraordinary a rule, without authority, is out of all sight; and, at present, I can only say, that I entertain the

greatest doubts of the doctrine of felony merging in treason, being applicable in this Court.

I am happy, however, to think, that from the view I have taken of the act of Parliament, and the oath in question, there are on the face of this statute, the most invincible grounds for holding that the indictment which has been preferred ought to be remitted to a jury, and that we are, in fact, left no discretion by the legislature itself. The clause upon which this part of the case is rested, I need not again read; but I think it necessary just to advert to one circumstance which was strongly pressed, and seems to have had great effect upon the opinion of my brother, Lord Gillies. I refer to the course of procedure which parliament is supposed to adopt, when it makes any deviation from former statutes, as is supposed to have happened in this case. The statute alluded to, was the 39th and 40th of the King. Mr. Grant, after referring to the statute 9 Geo. I. goes on to state, that it was not thought, that by this act, the shooting at the King could be prosecuted as felony. He goes on to recite certain parts of the 39th and 40th of the King, and then calls your attention to the express statement in the latter part of the act; "That none of the provisions contained "in the several acts of the 7th year of King William III., "and the 7th of Queen Anne, respectively, touching trials "in cases of treason, &c. shall extend to any indictment of "high treason, in compassing, &c. where the overt act shall "be such as aforesaid; but, upon conviction, judgment "shall nevertheless be given, and execution done, as in "other cases of high treason, any law, statute, or usage to "the contrary notwithstanding." This reference to this particular statute led me to look to the act itself; and, I think, when your Lordships attend to its terms, you will find there the clearest and most invincible reasons for those particular clauses being inserted in it. What is the title of the act? "An act for regulating trials for high treason, and "misprision of treason in certain cases." It then proceeds to enact what is stated in the pannel's information, and concludes with providing, that nothing in the acts touching trials for high treason, &c. shall affect that statute, because there is a new mode of trial prescribed; and that wherever the charge is, that of compassing and imagining the death of the King, (the most detestable of all treasons,) and the overt act, the actually shooting at him, &c. it shall be lawful and competent to proceed to try those guilty of that offence *as for murder*, and on the same evidence as in trials for murder. Such is the object of the act of Parlia-

ment. That, however, clearly, was not to do away the crime of high treason and make it a felony, but to regulate the mode in which such acts of high treason might be tried; and the enactment is, that they shall be tried according to the form of trials for murder, and upon the same kind of evidence. Seeing this was a new regulation for the trial of what was actually high treason, was it not necessary, having made this new provision, to declare, that nothing contained in the two former statutes, with regard to trials for high treason, should be construed to extend to this act of Parliament? This was the only course which could be followed, when a new regulation was to be made for the highest species of high treason. The whole weight and effect of this authority, therefore, is done away, upon looking to the act itself and its true object, which was to make a new system of trial for certain acts of treason. Such being the true object of the statute 39th and 40th of the King, it was necessary to subjoin that part of the clause which has been founded on, as so decisive in this case.

There is another view that may be taken of this act which appears to me to afford an unanswerable reply to the statement made on the part of the pannel, as to its being absurd and incredible to suppose that the legislature, in passing the statute 52d of the King, could have contemplated the possibility of declaring that to be a capital felony which amounts to high treason. That act, 39th and 40th of the King, was passed, in order to regulate, as I have just said, the trial of the highest degree of treason which it is possible for a subject to commit. It enacts, that where the overt act shall be even the actual assassination of the King, the trial shall nevertheless proceed in the same manner, in every respect, and upon the like evidence, as in trials for murder. The act then inserts the clause founded on by Mr Grant, and concludes with declaring, "Judgment shall, never-"theless, be given, and execution done, as in other cases "of high treason, any law, statute, or usage, to the con-"trary notwithstanding." What is it then the legislature has here done? It has declared, that, in reference to this, the highest and most aggravated species of treason, all the privileges of treason-trial shall for ever be taken from the subject, and that he shall not have the usual benefit attending trial for treason. Where the overt act charged is the assassination of the King, the accused may be tried as for a common murder, and be convicted upon the same evidence as in a trial for murder. Here is a declaration of the legislature in regard to the highest species

of treason; and yet it was pressed upon your Lordships, as the most incredible and absurd of all propositions, that in reference to other treasons, as well as to this, the legislature should ever have intended to declare, that certain oaths, purporting or intending to bind to commit treason, should be declared a capital felony and liable to punishment as such; and that there would be the utmost danger to the subjects of this country, and to the person of the King himself, by the adoption of any such construction, as is here contended for on the part of the prosecutor. This very act, founded upon by the pannel, affords, however, a satisfactory proof, that, whenever the legislature thinks it necessary to make an alteration of the law as to treason, it does so without hesitation, if it thinks such alteration is for the benefit of the public at large; and we see that it accordingly provides, not only that the cases of treasonable oaths and prospective treasons, but of overt acts of the highest kind of treason themselves, may be tried as capital felonies.

But the clause in the 52d of the King leaves no doubt as to the conclusion we ought to draw. Admitting the correctness of Mr. Grant's statement as to felony merging in treason, I say there is an authority before your Lordships to which we must bend, and as to which we have no discretion. It is said to be an ambiguous clause, but we are bound to give a meaning to it; and I think it has declared expressly, that a fact, or an offence, which may be charged in violation of this act of Parliament, may be charged as an act of high treason; under this qualification, however, that the accused has not been brought to trial before for the lesser offence. I cannot hesitate, or doubt, that the English lawyers who drew this act of parliament, must have had in view the possibility of oaths being administered, which, in certain circumstances, might amount to high treason; for they must have had before them the statute 36th of the King, as well as that of Edward III.

Having submitted to your Lordships those observations, at perhaps too great length (but in justice to the pannel at the bar, to the law of the country, and in discharge of my duty, I wished to deliver my opinion fully and explicitly,) I have no difficulty in saying, that, upon attending to every thing that has been urged with so much ability for the pannel, I have no alternative but to find this indictment relevant, and remit it to an assize.

There will, no doubt, remain an important and sacred duty to the jury to perform, and which they will discharge, I have no doubt, as uprightly and carefully as we have en-

deavoured to perform ours. They will have to take the whole case into consideration, and make up their minds upon the oath, as the Court has done, and will have to say whether the pannel, if concerned in administering it, is guilty of the crime laid to his charge. It is possible the jury may differ from us as to the import of the oath, but I feel that as a difficulty of no magnitude in the case. There are many cases where we are bound to give our opinions to juries on the subjects upon which they have to return verdicts; and I should be the last man to wish that they should feel themselves in the least degree fettered in their judgment by our opinions. It is my duty, after stating the facts of a case, to explain my view of the law, and frequently to pronounce my opinion as to the import of the facts, after they are disclosed in evidence. In a late trial for sedition, I was called upon to state that there was sedition upon the face of the speech, in that case; but I, at the same time, told the jury that they were to make up their minds upon that point, and decide for themselves. Suppose the jury had found for the pannel in that case, should I have felt any uneasiness? Being confident that I had done my own duty, I should have given them credit for uprightness and integrity in the discharge of theirs. Having performed my duty, to the best of my abilities, I care nothing, in any case, for the consequences.

"The Lord Justice-Clerk, and Lords Commissioners of "Justiciary, having considered the criminal indictment "raised and pursued at the instance of his Majesty's Ad- "vocate, for his Majesty's interest, against Andrew "M'Kinley, pannel, with the informations given in for the "prosecutor and pannel in terms of the order of Court, "dated the 23d day of June last, and before recorded, "and the supplementary information given in for the said "Andrew M'Kinley, also before recorded; they repel the "objections stated to the relevancy of the indictment: "find the indictment relevant to infer the pains of law "specified in the act of Parliament libelled on; but allow "the pannel to prove all facts and circumstances that may "tend to exculpate him, or alleviate his guilt, and remit "the pannel with the indictment as found relevant to the "knowledge of an assize.

"D. Boyle, I. P. D."

Lord Advocate.—To morrow is Saturday. Although I do not anticipate a very long trial; yet, to avoid unneces-

sary discussion to morrow, which might eventually lead to an encroachment upon the next day, I wish to know now if any ground for farther delay is to be stated; and what witnesses are to be examined for the pannel.

Mr. Grant.—The agent for the pannel informs me that the witnesses are not all come forward.

Lord Justice-Clerk.—An application was made to the Court, on the part of the pannel, to know whether, supposing the relevancy of the indictment to be sustained, we should proceed next day with the trial? and we stated, that, in that event, (as to which, however, we could anticipate nothing,) we should be prepared to proceed.

Lord Advocate.—I am entitled to have a list of their witnesses the day before the trial. Trusting, however, to receiving this list and the defences (which have not yet been lodged) in the course of the evening; and to there being no discussion on any of these preliminary points in the morning, I should still beg leave to suggest that your Lordships should not meet later than nine o'clock.

Lord Justice-Clerk.—Gentlemen of the jury, I have to repeat that the Court regrets extremely this case has been productive of so much trouble to you. This has been from no fault of the Court; and, I trust, you will not grudge giving yourselves a little farther trouble in a case of such importance to the pannel and to the country.

"The Lord Justice-Clerk, and Lords Commissioners of "Justiciary, continue the diet against the pannel, and "whole other diets of Court till to morrow morning, "at nine o'clock, in this place; and ordain all concern-"ed then to attend, under the pains of law; and the "pannel, in the mean time, to be carried back to the "castle of Edinburgh."

THE

TRIAL

OF

ANDREW M'KINLEY,

FOR

ADMINISTERING UNLAWFUL OATHS.

PRESENT.

RT. HON. DAVID BOYLE, LORD JUSTICE-CLERK.

LORD HERMAND.	LORD PITMILLY.
LORD GILLIES.	LORD RESTON.

Counsel for the Crown.

RIGHT HON. ALEXANDER MACONOCHIE, LORD ADVOCATE.
JAMES WEDDERBURN, Esq. SOLICITOR-GENERAL.

H. HOME DRUMMOND, Esq. | H. WARRENDER, W.S. AGENT.

Counsel for Andrew M'Kinley.

JOHN CLERK, Esq.	FRANCIS JEFFREY, Esq.
GEO. CRANSTOUN, Esq.	J. P. GRANT, Esq.
THOS. THOMSON, Esq.	HENRY COCKBURN, Esq.
JAMES MONCRIEFF, Esq.	J. A. MURRAY, Esq.

D. RAMSAY, W.S. AGENT.

ANDREW M'KINLEY was placed at the bar.

LORD ADVOCATE.—Before a jury is impanneled in this case, I think it right to state to your Lordships, that one object which I had in view in laying this indictment upon the statute upon which it is founded, has been accomplished. Your Lordships, by your decision yesterday, have promulgated to the people of this country, that the offence with which the pannel is charged, is one of the most aggravated description, and that the lives of the guilty are forfeited to the law. I trust, most sincerely I trust, that your Lordships, by this judgment, have opposed a barrier against the commission of this offence in future, and thereby put a final stop to a crime so utterly subversive of the public tranquillity.

In this reliance, and considering all the circumstances of the case, as well as yielding, I hope not improperly, to the dictates of my own feeling, I trust that I am doing what will not meet with the disapprobation of your Lordships, when I state that I mean to restrict this indictment to infer merely an arbitrary punishment.

At the time that I do so, I trust I shall be permitted by your Lordships to make a single observation on some of the pleadings for the prisoners, in which, I apprehend, I have been brought more personally forward than is usual in the pleadings of this Court. I regret the circumstance, not on my own account, because I can receive such insinuations as they merit, trusting that a conscientious discharge of my duty will sufficiently protect me against them, however injurious they may be; but I sincerely regret that my learned friends on the opposite side of the bar should have advisedly insinuated that I have been guided by "an overheated zeal," by "a desire to take away the life of the pannel upon undigested notions which I could not define." And yet these, and many other insinuations of a similar nature, have been made in the broadest manner against me, which, I must be allowed to think, it would have been in better taste had my learned friends thought proper to avoid.

In like manner, it seems most strange, that, without any object in which their clients can have an interest, (or rather the interest which they have lies directly the other way) and when by the form of pleading, I had no means to refute it, a proposition has been maintained by the learned gentlemen, utterly unfounded in law, and which never was before heard of till it appeared in this information. The doctrine I allude to is, that the remedies of the statute 1701 are not competent to a prisoner incarcerated upon a charge of treason. This doctrine, I say, never was before maintained. It is utterly unfounded, and in opposition as well to the terms of the statute itself, as to the concurrent testimonies of all the lawyers both of England and Scotland, since the Revolution. For the same statutes that have suspended the writ of habeas corpus in matters of treason, have also suspended the operation of the act 1701, in the case of persons imprisoned on similar charges, and on these alone.

I hope it will not be deemed improper that I should thus have repelled what I must hold to be a libel on the law of Scotland, especially when it seems to be so much the fashion to traduce it. But I shall trespass no farther than by giving in a minute restricting the libel.

Mr Cranstoun.—I have just one word to say, in consequence of the address which we have now heard. I confess I am totally unaware of the allusions in either the verbal or printed pleadings, with regard to which his Lordship has now addressed the Court. In so far as I was concerned, I had no intention to reflect upon him

Lord Advocate.—I do not allude to you, and I refer chiefly to the printed proceedings.

Mr Cranstoun.—I believe I may say the same thing for my learned brethren as for myself. We viewed the indictment in one light, and his Lordship did in another; but it never was our intention to make personal imputations upon him.

If there were to be any discussion in this matter, there are some observations in the information for the crown which bear hard upon the counsel for the pannel. It is stated in that information, that one of the prisoners' counsel had bestowed a panegyric upon the association of those persons who took the oath founded upon in the indictment,—which is an entire mistake and misrepresentation.

With regard to whether the act 1701 applies to cases of treason, that has not been argued in either the written or verbal pleadings. Perhaps a doubt may have been thrown out on the subject, and all that I can say is, that none of the prisoners' counsel have made up their minds one way or another with regard to it, nor do I know that any judgment has ever been pronounced upon the point. The prisoner has perhaps already run his letters.

I am sorry if any expression has been made use of that could give displeasure to the Lord Advocate. No personal imputations whatever were intended against him.

Mr Grant.—I rather think I am called upon, and in a manner very unusual, to make a few observations; and it is by dint of recollection of two words which the Lord Advocate employed, that I think it is the last paragraph of the second information for the prisoner, which was written by me, that has excited his Lordship's animadversions. I do not know that I am very strictly in order before you at present; all I can say is, that this paragraph runs in these words: "According to the construction which the prosecutor would put on the intention of the legislature in passing the statute on which he has laid the present indictment, he would impute to the legislature this inconceivable injustice

and absurdity, that on the one hand the highest and most dangerous species of treason, involving a meditated attack on the life of the sovereign, sanctioned by the solemnity of an oath, and extending, as is alleged in this case, to a conspiracy of hundreds or thousands of persons, threatening, as is here also alleged, to effect the subversion of the established government, laws, and constitution of this kingdom, by means which involve the whole nation in bloodshed and in open war, may be tried as a felony, punishable only with transportation; and the indictment, being once preferred, whether by a grand jury in England, or the public prosecutor in Scotland, no remedy remains but the offenders must be for ever discharged by this means, from all further consequences of their guilt. And, on the other hand, by the contrivance of the officers of the crown, the subjects of this country may be brought to trial, and placed in hazard of their lives on a state prosecution, with the whole weight and influence of government to oppose them. The overheated zeal of its officers excited, perhaps their interest and reputation at stake on the issue, as well as the passions of the factious, the terrors of the timid."—The passage being written in the heat of the last paragraph, the terms, perhaps, are not so eloquent as they are numerous. It goes on,—"the just indignation of the well affected against crimes involving the common safety, overpowering the natural disposition to clemency and deliberation, all combining to deprive the accused of the security which, in ordinary cases, they possess for a fair and impartial trial, while they are, at the same time, stripped of the safeguard which it has been the ceaseless endeavour of the law of England, from the most ancient times, even in the midst of tyranny and disorder, to provide for the protection of the subject against that oppression and that danger to which it has always felt and acknowledged him to be in these circumstances exposed. The prisoner will only add, that to put such a construction upon these acts of parliament would not be to expound the laws, but to libel those who made them. At your Lordships' hands he is certain there is no danger of their receiving such a construction, equally disposed as you feel, at once to protect the subject from oppression, and to vindicate the necessary justice of the country." The Lord Advocate hints that he individually is accused of overheated zeal, and that the paragraph is directed against his Lordship. I beg to assure the learned Lord that no such view occurred to me, and that what I stated I

intended as a general proposition, without particular application to any individual.

LORD ADVOCATE.—I am quite satisfied, in so far as I am personally concerned, and I am exceedingly glad that I mentioned what occurred to me upon the subject.

LORD JUSTICE-CLERK.—I am pleased to see the introduction of right understanding and harmony, which I trust will be uninterrupted throughout the trial.

The following minute was then read: "His Majesty's Advocate represented that one of the objects which he had in view in laying the present indictment for a capital punishment having now been accomplished by the judgment of the Court sustaining the relevancy, he now restricted, and hereby restricts the indictment and the pains of law to an arbitrary punishment."

(Signed) ALEX. MACONOCHIE.

The following persons were then named as Jurymen:

David Gray of Snipe.
James Mutter, farmer, Longside.
David Thomson, farmer, Wester Cowden.
John Anderson of Whitburgh.
5. James Wilson, farmer, Bolton.
William Wilkie of Magdalens.
John Thomson, farmer, Inneravon.
James M'Kenzie, goldsmith, Edinburgh.
Robert Green, watchmaker there.
10. Patrick Main, painter there.
Thomas Edmonstone, ironmonger there.
Archibald M'Dowall, merchant in Leith.
James Ogilvie, wine merchant there.
Robert Strachan, merchant there.
15. Robert Brunton, merchant there.

LORD ADVOCATE.—The witnesses who are designed as prisoners in the Castle of Edinburgh, were confined separately, and I directed that when brought down they should be kept in separate apartments.

LORD JUSTICE-CLERK.—The rest of the gentlemen who had been summoned as jurymen will consider themselves as discharged, and the Court has to express its regret that they have been put to so much trouble, and probably expense, in consequence of their attendance for this trial,

They must be aware that this did not originate from any fault of ours; and the duty for which they were summoned being a public and an important one, and the delay that has taken place unavoidable, I trust that they will the less regret the inconvenience which they have suffered.

Mr Jeffrey.—As the persons we may find it necessary to adduce as evidence on the part of the prisoner include those cited on the part of the crown, and as it has been impossible for us to get access in order to cite those who are in custody, the Lord Advocate will not object that we should cite them when they come into Court.

Lord Advocate.—Certainly not; I can have no objections.

Mr Jeffrey.—I observe that my learned friend, Mr Hamilton, and others who are cited as witnesses for the Public Prosecutor, are in the Court. I should object to their remaining in Court. The official gentlemen are, of course, above all suspicion; but I wish they should not be present till they are examined. Let them withdraw from Court, and such of them as are cited for us will leave word where they may be found.

Court.—They may go into the Robing-room.

Mr Jeffrey.—I observe Mr Salmond present, who was cited some time ago as a witness on the part of the prisoner; and I state generally, that circumstances may occur in the course of the trial which may render it necessary for us to examine that gentleman, and these may appear to the Court of a nature which might render it improper that Mr Salmond should have been present. He is not a crown agent; he is in an official situation at Glasgow. We could not prevent Mr Warrender, perhaps, from being present throughout the trial; but we have it in our power to say to our witness, Mr Salmond, who belongs rather to the other party, that he shall not hold intercourse with the prosecutor.

Lord Advocate.—I beg to state, that Mr Salmond is crown agent in this case. I have received great benefit from Mr Warrender's assistance in this case, as I do in every case; but the fact is, that the person who has conducted the present proceedings is Mr Salmond, who is, in

law, one of the officers of the crown in the inferior Court. He has taken the management of these cases from the beginning; and you might as well direct any other person conducting the trial on the part of the crown to withdraw as that gentleman. I have no objections that he be examined by the other party; but as he has been employed as agent, and is now acting as agent in this trial, I object, therefore, to his being excluded from Court.

Lord Justice-Clerk.—In a case of this particular description, where the prisoner's counsel states, that certain evidence, that may be of advantage to the pannel, may be expected from this procurator-fiscal of Glasgow, Mr Salmond, the pannel has a right to insist he should be excluded if he thinks his presence would be disadvantageous to him. Mr Warrender is in a different situation—he could say, here I am in my place, and you might as well remove any members of the Court as myself.

Lord Hermand.—Could Mr Salmond be examined now?

Mr Jeffrey.—He is cited as a witness for the prisoner, and can only be examined when the prisoner comes to examine witnesses in defence.

Lord Advocate.—Mr Warrender has never been recognised by the Court as crown agent. Your Lordship's predecessors have uniformly refused to acknowledge any such person. He is no public officer. The procurator-fiscal is a crown officer.

Lord Justice-Clerk.—Mr Warrender is perfectly well known to be crown agent.

Lord Gillies.—The rule is general, and there can be no exceptions.

Lord Advocate.—I submit to the Court, that there is, at this moment, nothing offered to be proved by the prisoner's counsel by the evidence of Mr Salmond, to lead the Court to deprive me of his services. There is nothing but a broad averment that his evidence may perhaps be necessary. What they propose is beyond what has been done in any case; and, at all events, they should state what they mean to prove by his evidence.

LORD JUSTICE-CLERK.—They say he is a necessary witness for the defence. I think it proper to remark, that Mr Salmond, as procurator-fiscal at Glasgow, would be considered as crown agent at the Circuits there; but Mr Warrender is crown agent here, and not Mr Salmond—Call the witnesses.

LORD ADVOCATE.—As the witnesses have not yet arrived from the Castle, I suppose there will be no objection to the declarations of the pannel being now read.

COURT.—There is no objection to this being done.

MR DRUMMOND.—Call Mr Hamilton. We shall first prove the declarations of the prisoner emitted before the Sheriff of Lanarkshire.

MR JEFFREY.—In order to save the time of the Court, we admit the declarations.

COURT.—Give in a minute to that effect.

LORD HERMAND.—I should wish to consider a little more the objection as to Mr Salmond being present in Court. With consent of the pannel he might remain in Court. It is admitted, that Mr Warrender, as crown agent, could not be inclosed. Now, Mr Salmond acts as crown agent on this occasion; and I doubt whether he can be inclosed. I should be sorry to do any thing against the pannel; but let his counsel state more explicitly their reasons for wishing Mr Salmond to be excluded. I suppose the pannel has an agent here; if the crown counsel were to say he must be inclosed, (by which the pannel's defence might be prevented from being made out,) could that be listened to?

LORD GILLIES.—I thought the matter had been disposed of.

LORD JUSTICE-CLERK.—When a witness is cited for both pursuer and defender, he is sometimes allowed to be examined for the defender immediately after his examination for the pursuer. And the question here is, Can Mr Salmond be now examined for the pannel?

MR JEFFREY.—Without prejudicing our defence most

materially, we could not examine Mr Salmond now. The necessity we may be under of examining him at all is but contingent, and depends on a certain part of the proof, if brought out on the part of the Crown.

Lord Pitmilly.—If the counsel for the pannel had consented, it would have been very well to have allowed Mr Salmond to remain in Court; but, as Mr Jeffrey says this might be prejudicial to the defence, it cannot be admitted.

Mr Jeffrey gave in the following minute:—"The counsel for the pannel admits that the declarations of the pannel libelled on, were emitted by him voluntarily and freely, of the respective dates they bear, and that the pannel was then sober and in his sound senses."

(Signed) F. Jeffrey.

The following Declarations were then read by the Clerk of Court:

FIRST DECLARATION OF ANDREW M'KINLEY.

At Glasgow, the 28th day of February, 1817 years—In presence of Robert Hamilton, Esq. Advocate, Sheriff-Depute of Lanarkshire; and in the Petition and Complaint presented by, and at the instance of, George Salmond, Writer in Glasgow, Procurator-Fiscal of the Lower Ward of Lanarkshire for the public interest,

Compeared Andrew M'Kinley, present prisoner in the tolbooth of Glasgow, who being judicially examined and interrogated, declares, That he is a native of Ireland; is from the county of Armagh; came over to this country in the year 1799; was bred, and has since followed after the trade of a weaver; is married; has seven children, and his wife is near her delivery of another: That the declarant subscribed the Calton reform petition, but the declarant cannot say what became of that petition, or whether or not there was a committee appointed to forward it: That the declarant has been for the last fourteen years a private in the volunteers and local militia in this place, and he was always very regular on duty: Declares that it never

was proposed to him what should be done in case of parliament not granting the prayer of the reform petition; and he never was connected with, or heard of any association or brotherhood, who were to take means for obtaining the desire of the petition by moral or physical force; nor of oaths of secrecy being taken under the punishment of death, not to reveal the proceedings of such associations, or inform on the members thereof, either individually or collectively: That he never had any copy of the Irish rebel oath, and he does not know its terms: Denies that he was ever at any meeting in Niel Munn's, Ingram-street, or in James Robertson's, in the Gallowgate: Declares that he does not particularly recollect where he was on the night of Saturday last was eight days, but he thinks he was in Arthur Armour's, taylor in Bridgegate-street, and different other places, looking for a coat to one of his children, but he cannot be certain that this was the case: That he cannot say positively whether he saw that night John Buchanan, Andrew Sommerville, James Robertson, Hugh Dickson, Peter Gibson, James Hood, James Finlayson, or Hugh Cochran, who were taken up with him on Saturday last in Hunter's, in the Old Wynd of Glasgow: That on the last Saturday evening, the declarant called at Hunter's house, and told the mistress that he wanted a room, and he and John Campbell, who was with him, were shewn into one; but as the declarant's feet were wet, she soon afterwards showed them into another one, where there was a fire: That this might be about six o'-clock, and they were soon after joined by some others, who Mrs Hunter showed into the room, but what they wanted the declarant cannot say, for he left the room soon after he went in, and went away in quest of the coat for his boy, and he did not return till about ten minutes before the Sheriff and party came into Hunter's, and apprehended them all: That the declarant knows of no other motive which could induce these people to have met at Hunter's, than that of providing funds for enabling them to carry on the case relative to the poor's rates, or cause M'-Innes against the Barony Kirk-session of Glasgow: Denies that he was at Carmunnock on any occasion lately, and especially that he was there with Mr James Finlayson, junior, and had a conversation with David Dryburgh, the schoolmaster in that place: That when he was apprehended in Hunter's, as above-declared to, he called himself Andrew Brotherstone; but this was done from no ill intent, and merely to prevent, in case of his being detained, the landlord of his house, to whom he owes the last three

half years' rent, attaching his furniture and exposing his family; but though he heard Peter Gibson, another who was then taken up, call himself John M'Kinley, yet he is not acquainted with his motives for doing so: That the declarant never was at Cambuslang, and he does not know rightly where that place is. In witness whereof, &c.

(Signed) ANDREW M'KINLEY.
R. HAMILTON.

MATTHEW BURNS, witness.
JAMES THOMSON, witness.

SECOND DECLARATION OF ANDREW M'KINLEY.

At Glasgow, the 4th March, 1817,

Compeared Andrew M'Kinley, present prisoner in the Tolbooth of Glasgow, who, being examined and interrogated, and his declaration of the 28th ult. being read over to him, Declares and admits, that he was present at the several meetings held in Niel Munn's in the beginning of the year; in Fyfe's, Wilson-street, on two occasions, sometime afterwards, and in Robertson's, Gallowgate-street, on Saturday night, the 15th ult. That he was also present at a meeting which took place in one Leggat's, corner of Centre-street, Tradeston, on the first day of the year. That the objects of these several meetings he cannot rightly describe, a desultory conversation having generally taken place, partly about the reform petition, and partly about the poor's rates. That his reason for denying, on his former examination, that he attended these meetings was, that he was averse to bring the keepers of these houses into trouble, or expose them so as they might be deprived of their licence. That he knows two or three of the people whose names are subscribed to the paper which is marked as relative hereto, viz. James Turner, tobacconist, Alexander Kennedy, change-keeper, Bogie, John Ogilvie, Robert Kerr, manufacturer, and Alexander Richmond: That he knows these people, some of them merely as members of the reform committee: That he also knows Lang the printer, having called on him about hand-bills connected with the Calton reform petition; and with this addition he adheres to his former declaration.

(Signed) ANDREW M'KINLEY.
DAN. HAMILTON.

JOSEPH REID, witness.
JOHN LESLIE, witness.

THIRD DECLARATION OF ANDREW M'KINLEY.

At Glasgow, the 5th March, 1817,

Compeared Andrew M'Kinley, present prisoner in the Tolbooth of Glasgow, who, being examined and interrogated, and his declarations emitted on the 28th of Feb. last, and yesterday, being read over to him, he adheres thereto, with this variation, that he was at Carmunnock with James Finlayson, about a fortnight ago, and was with David Dryburgh in his own house there: Declares, that he knew nothing of Dryburgh before, and that Finlayson took him there, having raised him out of his bed, in Calton, that morning on purpose: Declares, that the first time he saw Finlayson, was either in Robertson's, or the Gallowgate: That his first particular acquaintance of him, was at Robertson's, where they met about the Barony process; and Finlayson said at that meeting, that he thought that a just cause, and wished well to it; and the declarant does not know what else could have brought Finlayson to that meeting; and the purpose of the meeting was to consider how they might raise funds to carry on the process: Declares, that he did not use the name of James Black, nor did any one else, to his knowledge, to obtain admission to that meeting: Declares, that there was no discussion at that meeting, or at Hunter's, about annual parliaments and universal suffrage. Interrogated, Declares, that he did not know for what purpose Finlayson wished to go out to Carmunnock, nor why he wished the declarant to go with him: Declares, that he thought his health would be better of the air, and that he had some conversation with Dryburgh about work, which was also an object he had for going there: Declares, that he had no conversation with Dryburgh about initiating people into any secret association, nor had Finlayson to his knowledge: Declares, that besides the meetings abovementioned at Hunter's and Robertson's, he was present at another in Robertson's, and one in Munn's, as formerly mentioned: Declares, that the object of all those meetings was the same; and it was the declarant's opinion that trade would have been better, if they could have succeeded in that process, as the poor's-rates would make the gentlemen exert themselves: Declares, that any person might come into those meetings who had an interest in that process: That the meetings were not publicly

called, as they could not get the use of the bell, but every one warned another: That the greatest number present never exceeded twenty, and that he has seen the bell call the people for such a purpose, and not a dozen attend: That he can give no reason why so much greater a number were collected the day they went to Dr Burns with a petition. Interrogated if he remembers, if M'Lachlane, Campbell, Dickson, Hood, Buchanan, James Robertson, and Peter Gibson, and Somnerville, were present at some of those meetings, Declares, that he does; and declares positively, that there was no other business at any of those meetings, except what is above mentioned, and nothing secret of any description. In witness whereof, &c.

(Signed) ANDREW M'KINLEY.
HUGH KERR.

FOURTH DECLARATION OF ANDREW M'KINLEY.

At Glasgow, 11th March, 1817,

In presence of Robert Hamilton, Esq., Sheriff-depute of Lanarkshire, compeared Andrew M'Kinley, present prisoner in the Tolbooth of Glasgow, whose declarations emitted on the 28th ult., 4th and 5th current, being read over to him, he adheres thereto, and being further interrogated, declares, that he is acquainted with a Mr Kerr, a manufacturer, whose place of business used to be in Gibson's-street, in Gallowgate: That Robert Paul and John M'Lachlan, sometime ago, told the declarant one day, they were looking for Mr Kerr to ask him for money to assist in carrying on the Barony session plea, but whether they found him, or got money from him, the declarant cannot tell: That in Leggat's, on 1st January last, there were present the declarant, Hugh Dickson, Peter Gibson, James M'Ewen, John M'Lachlan, William Edgar, and a man from Long Govan, whose name he does not recollect: That a paper which the declarant gave to Edgar was read over to the meeting, but disapproved of: That the tenor of what the declarant so gave Edgar, was in substance, that the persons subscribing should bind themselves to keep it a secret among themselves. Whereupon the Sheriff-examinator warned the declarant, as his duty, he said, directed him, that the declarant was not urged to disclose any circumstances which might affect him in his defence, to the very serious criminal charge which was brought against him; and he, there

fore, left it entirely to his own discretion to speak farther out or not as he thought fit. Whereupon the declarant said, that he was much affected by the distress that his family was in, and he hoped that mercy would be shewn him and them, and that he would then state every particular he was acquainted with. But the sheriff freely and explicitly stated to him, that he could give him no assurance of any kind whatever, and that the declarant must just, therefore, conduct himself as he had already pointed out. The declarant then declared, that he was afraid he had been led into measures which were highly wrong and illegal, and that he never would have thought of any thing of the kind, had they not been broached to him by John M'Lachlan: That John Campbell, he thinks, informed him, that Mr Kerr above declared to knew of the secret association that was set on foot: That he was to assist it, and do what he could in giving or getting money: That he heard one Johnstone, a weaver in Bridgeton, in a meeting which took place in Fyfe's, Wilson-street, say, that there was a club of honour, of gentlemen, or something of that kind, which was existing in Glasgow, who were friendly to their measures, and that this body was numerous, and had existed for nine months; but upon recollection, declares, that he cannot say whether the word club was mentioned, or not. That some names of such persons may have been mentioned, but he does not now recollect any of them: That at a meeting at Niel Munn's upon the 4th of January, M'Dowal Peat and James M'Ewen proposed and said, that they would go out next day, being Sunday, to David Dryburgh, schoolmaster at Carmunnock, and initiate him into the matter, and M'Ewen said he was sure he was a friend, and that he had been long acquainted with him. And at the next meeting which was held at Robertson's upon the 11th, James M'Ewen and Peat reported to the meeting that they had initiated Dryburgh: Declares, that upon a Wednesday, about four or five weeks ago, as he thinks upon the 12th of February, James Finlayson and he went up to Carmunnock before breakfast to David Dryburgh's. That this was the first time he had seen Dryburgh, and they found him in bed, but he got up and got breakfast for them, and the said David Dryburgh he yesterday saw and recognized in this room. That he immediately found Dryburgh to be an initiated man, and Dryburgh shewed him the copy of the oath of secrecy, or obligation of the initiated, which had been left with him by M'Ewen and

Peat, with their names subscribed, and the places where Dryburgh would find them. That the object of Finlayson and him in going to Dryburgh, was to learn what progress he had made in the matter of initiating, and Dryburgh told him that he had given the oath of secrecy to two; and he added, that all the Carmunnock people were friendly, and that it was to no purpose to petition parliament. That when Finlayson and he went to Carmunnock, they first asked Dryburgh if he had got a letter from John Buchanan, the person now a prisoner in the Tolbooth of Glasgow, and Dryburgh having said that he had got such a letter, they thereupon began to communicate upon the business they had come upon. That he has spoken to Robert Kerr above declared to in Young's beaming-shop, where he saw him upon some business about webs, and he would know him if he saw him again: Declares, that he knows James M'Tear, who has his school-room in New-Street, Calton. That the said James M'Tear, he knows, gave the use of his school-room for the purpose of putting together the petition for reform from the Calton, previous to its being sent away, and he presumes that M'Tear was a friend to that measure, by his having so given the use of his room. That it was talked of among them that they would certainly get money from some of these honourable men, as they were called, in and about Glasgow, who were said to be so friendly to them; but he cannot say that any promise of money was actually made, nor can he condescend upon the names of any of these. That at the last meeting at Robertson's, Campbell, who used to be saying that he would get money, stated, that he had had a communication with some of the honourable persons above-mentioned, but that none of them would come forward with their assistance but one, and though he did not mention his name, the declarant conjectured that it was Mr Kerr that he alluded to. That Johnston in Bridgeton, above declared to, he believes is brother to the Johnston who was tried and imprisoned for the weavers' combination. In witness, &c.

(Signed) ANDREW M'KINLEY.
R HAMILTON.

JOSEPH REID, witness.
MATTHEW BURNS, witness.

FIFTH DECLARATION OF ANDREW M'KINLEY.

At Edinburgh, 18th March, 1817.

In presence of the Sheriff-substitute of Edinburghshire, compeared Andrew M'Kinley, present prisoner in the Castle of Edinburgh, and the declaration emitted by him before the Sheriff-depute of Lanarkshire, at Glasgow, on the 11th day of March current, being read over to him, he declares that said declaration contains the truth, with this exception, that he is certain of some things which in that declaration he only said he supposed. Declares, that he knows that Mr Kerr promised to get money, or to use his endeavours to get money, in the declarant's presence, on the occasion mentioned in said declaration. That Campbell said it would take eight or ten pounds, and Kerr said he would endeavour to get that sum. Declares, that after going to Hunter's on the night they were apprehended, the declarant, Finlayson, and Campbell, went out of the meeting to Mr Kerr's warehouse. That the declarant had never been there before, and he and Finlayson waited a considerable time at the bottom of the stair, while Campbell went up and talked to him. That Campbell then came down for them, and they all went up together, and then the conversation above-mentioned passed about the eight or ten pounds. That Kerr spoke about a paper which he declined shewing at that time; but said, that he would allow Campbell to come in upon the Tuesday following, and take a copy of it. That the declarant understood from what passed, that the paper was some sort of constitution, or rules for the formation of a club or society. Declares, that this paper was to be for the use of the same people who met at Hunter's with the declarant; and Mr Kerr said that he had this constitution at the time they were in his warehouse. Declares, that John Campbell told the declarant, and Hugh Dickson also told him, that Mr Kerr was in the knowledge of their meetings. That Campbell asked him if he would come that night, which he declined upon that occasion, saying, he would give them all the instructions in his power, but, being a man in business, it might hurt him if he attended meetings. Declares, that Mr Kerr certainly must have known the oath that was taken by the people that attended at Hunter's. Declares, that Campbell and Dickson told the declarant that Kerr had been initiated, and certainly they would not have gone to him for money if he had not. Declares,

that a fortnight before this, at one of the meetings at Robertson's, when there was a conversation about allowances to delegates for going to Carmunnock and Paisley, three shillings and twopence was allowed to M'Dowall Peat, and M'Ewen, for going to Carmunnock to initiate Dryburgh, but there was a difference of opinion about an allowance for Campbell and John Buchanan for going to Paisley, and Campbell declined taking any money or going to Mr M'Arthur to obtain five pounds, which Campbell said he was to give him a bill for the loan of, as his going there might be chargeable to the meeting. Declares, that he believes the money would have been got from Mr Kerr on the Saturday following their apprehension. Interrogated, declares, that he never heard any thing about arms from any person whatever, except James Robertson, saying, that he had heard that there were some arms somewhere, which some persons had been keeping since the year 1793, but Robertson never mentioned the name of any person or place; and the declarant does not believe that he knows of any particular place, and considered what he said to be a mere rumour. Declares, that he does not know the names of any of the persons referred to in the 5th page of the former declaration above-mentioned, and does not know who can tell the names, unless it be Alexander Richmond. Declares, that Campbell told the declarant that Campbell and Buchanan were to attend the meetings, but that they rather wished that Buchanan should not be present, as they did not consider him steady enough. Declares, that he never saw Edgar, except at the meeting at Legget's, that he knew of, and declares that Edgar was not present at any of the other meetings when the declarant was present, and all this he declares to be truth. In witness, &c.

(Signed) ANDREW M'KINLEY.
JAMES WILSON.

ARCHB. SCOTT.
JAMES CURRIE.

MR DRUMMOND.—Macer, call John Campbell.

MR JEFFREY.—This is one of the witnesses who is described in the indictment by no other designation than as present prisoner in the Castle of Edinburgh; and we think it right to state to the Court, that this is not a designation sufficient for the information of the prisoner, and that circumstances have concurred with the fact of his being a prisoner there, which entitle us to object to his being received

as a witness at all. The fact is, and we can establish it by evidence, that having received only this intimation of the condition or quality of the person served upon us as a witness, we took steps to inform ourselves of this individual person, and to make the other necessary enquiries, with a view to which, the law has provided that a list shall be given to the prisoner of the witnesses to be adduced against him at his trial; but we were obstructed entirely in the prosecution of these enquiries, and were prevented from receiving any sort of benefit or advantage from that list of witnesses as to this person. We are ready to instruct, that this person was not in that custody in which persons adduced as witnesses in this Court, and designed as prisoners, are usually found. We could only get access to this witness by applying to military authority; and, in absence of the governor of the castle, we were referred to the fort-major; and on application to him, we were civilly, but peremptorily told, that he had received orders to admit nobody to the prisoner unless by permission of the crown agent. Accordingly, the agent for the prisoner, after receiving this answer, made a regular application to the crown agent, and also to the public prosecutor, his majesty's advocate, setting forth the facts which I have already stated, that this person was among the list of witnesses designed as prisoners in the Castle of Edinburgh; that application had been made for access to the witnesses so designed, in order to learn who they were, and to put such questions as law allows to be put to witnesses, and that application had been made to the fort major, who returned the answer which I have just mentioned. To this application an answer was returned, stating, that, in the circumstances of the case, the Lord Advocate refused to give access to the prisoners in the Castle, and declined giving authority to the agent for the prisoner at the bar seeing the witnesses mentioned in the list served upon the pannel.

This is the shape of the case. We are now brought to your bar by the public prosecutor, who produces against us a witness, as to whom we have not the benefits intended us by the law, which requires a list of witnesses to be served; and although the fact is, that this person's name does stand in the list served upon us, yet, to all intents and purposes, the case is the same as if an individual, of whose name we had never heard, were to be examined against us.

In this Court, where such substantial and important interests are concerned, if the serving of a list is accompanied with such acts as prevent us from getting any benefit from it, it is the same thing as if the list had not been served at

all; and as it is not a mere matter of form that a list should be served upon a prisoner, but is intended to enable him to prepare for his defence, so, when the public prosecutor holds out a list, and then interrupts all the advantages that could be derived from it, that must be a bar to the examination of the witnesses.

What is the purpose which the law contemplates in providing that a prisoner, charged with a crime, shall have a list served upon him of the witnesses who are to be adduced against him at his trial? First, that he should satisfy himself who the witnesses are. There may be fifty persons of the same name; and it is a fault in the list itself, if it do not contain such a description of the witnesses as to let us discover who the individual is. If, in point of fact, the description has been so deficient as not to enable the prisoner to discover who the witnesses are, it is a sufficient objection to their being examined as witnesses. Now, this witness was shut up in the Castle of Edinburgh, and upon making application to the civil and military powers we were denied access to him. You have found that a description of a person as residing in a certain street in Glasgow is not enough; or of a person as following a particular profession in the town; and is it sufficient then to say of a witness, that he is a prisoner in the Castle of Edinburgh? It is not a sufficient specification—it is only the beginning of one. What purpose did it serve to tell us he was in the Castle of Edinburgh, if he was not to be exhibited to the prisoner? The prosecutor prevented us from identifying the witness. How can we know who the witness is from any thing yet told us? He is a man shut up in a sealed casket to whom we can have no access. He is still an egg in the shell, and is not to come out until the proper process of incubation be gone through by his majesty's advocate. The public prosecutor has been hatching this evidence in the Castle of Edinburgh, and it is not yet disclosed. If we go to the Castle, and approach the sentinels to ask admission to the witnesses, they ask, who goes there, and present their muskets to us. We then go to the more civil fort-major, who tells us to go to the crown agent. He refers us to the Lord Advocate. His lordship declines giving us access. Have I thus any benefit from the intimation of the witness's name in a paper presented a few days before the trial? There are now five men, women, or children, in the Castle of Edinburgh who are to be produced as witnesses against the pannel, and whom we shall see for the first time when they are produced in the witness's box. For any substantial purpose whatever, do I receive any one part of the benefits

intended by law, by the serving of a list of witnesses? I do not know whether, in point of fact, such a person as the witness proposed to be adduced, has been in the Castle or not; and I have had no opportunity of enquiring what sort of a person this witness may be.

I offer to establish by evidence what I have stated, that, although we took all the regular means to get access to the witness by repeated, respectful, and earnest applications, they were all resisted by the authority of the public prosecutor, who served the prisoner with the list of witnesses. This is a personal exception to the public prosecutor, independent of the fact that we have been prevented from identifying this person. If we had been prevented by others from getting access to the witness, the prosecutor might have said, that the law would have afforded redress; that we ought to have had recourse to him; and that he was not to blame. But here it was the prosecutor himself who prevented us, the same person who presents a list containing the name of the witness, and at the same time tells me, he will not give me access to him.

Can, then, the public prosecutor act thus? Can he prevent me from identifying the witnesses? Can the person through whose direct act I am deprived of the benefits intended by law from the serving of a list of witnesses; can the public prosecutor, who, while he mocks me with the ostentation of the witness's name, prevents me from enquiring who he is, and making other enquiries material for my defence; can he be allowed, after such conduct, to examine the witness?

Without enquiring into the purpose of all this, I am entitled to say in law, that the witness has not been sufficiently identified, either by description or otherwise. But the case does not rest merely in that. Even after you have identified the witness, and come to know, out of the five thousand John Campbells inhabiting this Celtic country, who the witness is, and what kind of character he bears, the law still allows other privileges to the pannel. It is an unquestionable privilege of a prisoner, by himself, his counsel, or agent, to converse with witnesses, and learn from them what they have got to say. They cannot be compelled to answer; but, from intercourse with them, the prisoner might have had an opportunity of explaining what might otherwise appear to his disadvantage, or might get evidence to meet false statements. But the public prosecutor has, in this instance, denied him access, even under any precautions which might have been thought proper.

It is true, that under the interposition of this Court parties may have access to prisoners who are to be adduced as

witnesses against them; but in this case, where there was a peremptory denial of access by the prosecutor himself, who had sequestrated the witness in a garrison, I submit that I had no occasion to apply to the Court, because I have been obstructed in the exercise of the privileges which the law allows me, by the Lord Advocate himself, who served upon me the list of witnesses.

It is not enough to tell me, that I might have got the better of his repugnancy by other means; it is sufficient that he opposed my access, and that I have been prevented by him from identifying the witness, and from learning what law presumes would have been beneficial for my defence, by hearing the statements of the witness, preparing materials to obviate what I might think wrong, and redarguing the statements by other evidence.

I am ready to establish by evidence what I have stated with regard to this and the other witnesses, who are designed as prisoners in the Castle of Edinburgh. My statement you will take for granted in the argument. The description of the witness is incomplete, and I was prevented from access to him. The prosecutor has here, in reality, founded upon evidence which was not to be heard of or disclosed, till it appeared at the trial, and I have thus been prevented from ascertaining the facts that would have guided me in bringing counter statements in defence.

Mr Drummond.—You have heard an ingenious statement on the part of the pannel; but it cannot give your Lordships great trouble in disposing of it. Two things are alleged quite distinct from each other. One of them certainly is an objection to the admissibility of the witness; but, as it is obvious that, standing by itself, it cannot be listened to for a moment, Mr Jeffrey has mixed it up with what is not an objection to the witness at all, but a complaint as to the impossibility of preparing the defence, which is quite out of place here.

As to the objection, that the witness is not sufficiently described by being designed "present prisoner in the Castle of Edinburgh," Mr Jeffrey said that there is a great number of persons of the name of John Campbell; but the question is, whether there is any other John Campbell, present prisoner in the Castle of Edinburgh. If there are other prisoners there of the same name, from whom this witness is not distinguished by the description that is given of him, there may be something in the objection. There is, however, no such statement made; and your Lordships need not be told, that it is the daily practice of the Court to design persons as prisoners in such or such a tolbooth.

As to the other point, it is not an objection to the admissibility of the witness at all. It is a complaint that access has not been had to the witness for the purpose of obtaining information, as to what is to be said by him here in evidence. But this objection should have been stated by the pannel in a motion for delay of the trial. It was said, that the Lord Advocate had the witnesses shut up, and that he excluded all persons from having access to these witnesses. He claims no authority of the kind one way or another, either as to giving access or refusing it. In that place of confinement, the prisoners were under your Lordships' authority. Upon application to you from the pannel, it was for you to say, whether his counsel should have access to the witness; and they did not know their duty, if they did not bring forward this to the Court in a previous stage of these proceedings. It is said, that the witness was in the Castle; but that is the same thing as if he had been in the common tolbooth. The officers there, under whose custody the prisoners are lodged by the warrant of your Lordships, act as jailors under your orders.

This is not a new case. If the pannel's counsel had looked to the case of Nairn and Ogilvie, they would there have seen that witnesses were confined by authority of the Court in the castle. The confinement *there* was to prevent the witnesses from being tampered with, not by my learned friends, or by any person connected with this Court, but by other persons of a different description; such as the members of that society or brotherhood mentioned in the oath quoted in the indictment. It was to guard against the witnesses being contaminated, and prevented from telling the truth, that they have been confined separately and closely, as was done in the case above-mentioned. The pannel should have presented a petition to the High Court of Justiciary, as the witnesses stood committed by a Justiciary warrant, and an order would have been given for admission to them, if such a proceeding had appeared proper, in presence of one of the macers of Court, or other fit person, in the same way as admission was allowed to the witnesses who were confined in the case of Nairn and Ogilvie. He has been too well advised not to be informed what steps to take in order to obtain access, if it had been thought of advantage to him, and he had been legally entitled to it; and the bringing forward this objection only now, is obviously to prevent the case going to the jury at all, as the same objection would apply to all the witnesses. If it had been wished to serve the ends of justice, and allow the facts to be completely disclosed, whatever way they may tend, this objection would not have been reserved in

this manner, but would have been stated in a proper stage of the business.

Lord Advocate.—My learned friend has given a conclusive answer to the objections, and I shall not detain your Lordships by enlarging on the subject. It is proper, however, for me to state the concern I have had from the beginning in this matter. When these persons were first imprisoned, I thought it my duty to relieve your Lordships, at the expense of much trouble to myself, from the fatigue of constant applications from friends of the parties for admission to visit them; and I intimated, that if the names of those wishing access to the prisoners should be communicated to me, I would grant my consent or not, as I saw cause; and if I refused to afford it, it was competent to apply to your Lordships for redress. Accordingly, when an application was made to me, that the counsel or the agent in this case should be admitted to the witnesses, I thought it my duty to state, that I did not mean to consent; and they then had the means of applying to your Lordships, the imprisonment being on your Lordships' warrant, and not on mine. I stated accordingly, in point of fact, that these individuals being imprisoned upon your Lordships' warrant, application might be made elsewhere, if they considered themselves aggrieved. But no such application was made. The prisoner, too, has been at this bar at different times, when he might have stated his wish; and no application having been made, it is now too late to bring the objection.

Lord Justice-Clerk.—Have you any thing to say in reply, gentlemen?

Mr Jeffrey.—I shall trouble you with a very few words. If I understand the argument for the prosecutor, it is that our objection, so far as substantial, is not to the designation of the witness, but to the obstruction to the prisoner in the preparation of his defence. It is true, that is the ultimate ground of the objection; but is not that always the ultimate ground of objection to the production of any witnesses?—that as to the witnesses, in some way or another, the conduct of the prosecutor has improperly narrowed the power of defence? The ground the Court has always gone upon is just, whether the prisoner can make out any probable case of having suffered disadvantage in preparing his defence.

Is it right to say, I should have applied to the Court?

Am not I entitled, when a witness is produced, to state any thing in the conduct of the public prosecutor by which obstruction was thrown in the way of preparing the defence? Is it sufficient to reply, it is not time now to make the objection? If the public prosecutor has done any thing wrong, and continues it up to the day of trial, is it enough to say to me, I should have gone to the Court sooner with my complaint? He is not entitled to such a plea. If the prisoner thinks the conduct of the public prosecutor gives him a right to object to testimony against him, he is not bound to remedy the blunder or impropriety of the public prosecutor. And, the proper time for making the objection is, when the witness is brought forward.

Then, what is the objection? The objection is, that, in consequence of the fact of the witness being a prisoner in the Castle, I have been prevented by the public prosecutor from identifying that witness, or getting at the statement he is to make against me. Whatever directions the public prosecutor may have given, Mr Warrender, in his letter, says, " I am directed by the Lord Advocate to acknowledge the receipt, betwixt ten and eleven o'clock last night, of your letter to him of yesterday, applying, as agent for Andrew M'Kinley, to get access to Hugh Dickson, Peter Gibson, John M'Lachlane, William Simpson, and John Campbell, prisoners in the Castle of Edinburgh, and James Hood, prisoner in the tolbooth of Glasgow; and, at the same time, to acquaint you, that *his Lordship does not feel himself warranted to give his consent to your getting admission to these persons.*

" They are all in custody, under charge of being engaged in offences against the State, and they have been already cited as witnesses, to give evidence on the trial of Andrew M'Kinley. Upon both these accounts, therefore, *the Lord Advocate deems it incumbent on him to withhold his consent, as public prosecutor, from their having any communication whatever with the agents of the pannel, should any other steps be taken to obtain that object.*"

Our averment is, that we received a peremptory refusal of access. There was no modification or hint that we might apply to the Court, but it was a peremptory and positive refusal, the officer having previously told us, that, without an order from the Lord Advocate or the crown agent, we could not obtain access to the prisoners. The custodiar did not say, he must have a warrant from your Lordships, but, except upon an order from the crown agent, he

would not admit us. And we went, therefore, to the only quarter to which we were referred by the actual custodiar of the witness.—The fact is, that, when the agent applied to the custodiar, he was shewn a letter, desiring an exclusion of all persons except those coming with a warrant from the crown agent, who represented the Lord Advocate,—and he gave a peremptory refusal.

If we had been prevented from seeing the witness in consequence of the opposition of a third party, I could understand the propriety of applying to your Lordships; but, if the Lord Advocate, who incarcerated the witness, and who was referred to, as the only person who could grant liberty of access—if he refused it, he gave an illegal obstruction, by his own admission; for he admits, that, if I had applied to you, I would have obtained the access.

Lord Advocate.—I admit no such thing.

Mr Jeffrey.—I am entitled to have access to all the witnesses in the list served upon the pannel. If I have no access to them, they are witnesses against the pannel, without the nature and advantage of the premonition to him, which the law requires. The testimony depends upon words used by those individuals months ago, and we should have been entitled, if you had power to grant it, to have had access to those persons. If you are of opinion, I had right to see the witnesses through the intervention of your Lordships, and if the Lord Advocate, to whose authority I was referred by the custodiar, barred my access to them, that I might not have the means of casting his evidence;—in consequence of his conduct before the trial, he is not entitled now to bring forward those witnesses. Such an argument as that of the prosecutor is not allowed in a court of law. Suppose the fact were, that, instead of the Castle of Edinburgh, in custody of a military officer, another witness were now locked up in a small cellar of his majesty's advocate in Queen-Street. I knock at the door, and ask the servant to admit me to the prisoner—he refers me to his master—and he refuses the access required—would it be enough, afterwards, to say, I should have made application to the Court? Is it enough to say, there is a remedy somewhere, previously to the trial? It is enough for me to say to the prosecutor, you must run the hazard of your rashness, and you cannot oppose difficulties to me and tell me they may be obviated by application in another quarter.

As to the case of Nairn and Ogilvie,—in the list of witnesses there given, there was nobody designed as prisoner in the Castle. How then can that case be parallel to the present, when all I am told of the witness is, that he is a prisoner in the Castle, and when I go there, I find the ghost of the Lord Advocate standing at the prison bars, and nobody but the Lord Advocate can get admission to the witness? I asked his leave to see the witness, and he refused me. It is quite unnecessary to enquire whether I might have obtained admission by applying to the Court, and given up the benefit of my stating the objection now. The prosecutor took upon him to refuse me access to the witness, and I found my objection to the evidence of the witness upon that refusal. Upon all the principles of law, this is an objection to which no answer can be made. The fundamental principle, which requires a list of the witnesses to be furnished to the pannel, would be defeated, if the person who serves it could take such measures with regard to the witnesses as to prevent the pannel from identifying them.

Mr Drummond.—As to the case of Nairn and Ogilvie, I did not say it was parallel to the present case, or that any witness was there designed "prisoner in the Castle." I stated it as a precedent, to shew, where access could not be had to a witness in the Castle of Edinburgh, the course which should have been followed by the pannel's counsel.

Mr Jeffrey.—But here——

Mr Clerk.—Mr Home Drummond is very willing to make a reply himself.

I have just a word to remark on the case of Nairn and Ogilvie.

In the present case the Lord Advocate describes the witness as prisoner in the Castle of Edinburgh. What is the principle upon which you receive such a description? It is, that it is in the power of the pannel to go to the prison to see the witness.

In the case of Nairn, the Lord Advocate did what was regular and proper. He designed all the witnesses. There was no objection to the descriptions of them. They were imprisoned in the Castle, and the parties were left to apply to your Lordships to get access to them.

But, is that a similar case to this, where the Lord Advocate gives no designation or means to distinguish the witness? for though he designs him as prisoner in the

Castle, he shuts him up there, to prevent us from knowing who he is;—and, secondly, he prevents us from examining the witness.

There is no resemblance between the two cases. Nothing is done fairly here—there is no description of the witnesses, and the pannel is debarred from access to them. If there has been any thing illegal in the conduct of the Lord Advocate, he cannot examine the witness.

Lord Hermand.—It would be very fortunate for the pannel, and I should rejoice at it, if this objection would do, because the Court would immediately adjourn, and the trial could not go on.

A case occurs to me as like the present; and it is this—that an objection is purposely kept up, and (which does not apply here) for the very purpose of defeating the ends of justice. Where exhibits are mentioned in an indictment, it is always stated, these shall be lodged in due time, so as to be produced in evidence. I remember the case of Lyal, in 1811. There the articles were sealed up in packets, and they came without making application to the Court upon the trial, and said they were not lodged in due time, as they were shut up and could not be seen. What did the Court do? They repelled the objection. The same thing happened in the case of O'Kane, 1812, where bank-notes were lodged in a sealed parcel.

The case of Nairn and Ogilvie could not easily escape observation, as it was a remarkable trial.

If I were to decide upon the letters, I would call for them, but I do not think that necessary. I think the Lord Advocate judged well. I do not know whether he has a command over the macers; but he said he did not think it right to interpose with regard to the pannel's counsel getting access to the witness.

Mr Jeffrey. I deny that.

Lord Hermand. If I am mistaken in that, I do not want to state it. I think, if there had only been a junior counsel here conducting the defence, he would have had recourse to the case of Nairne and Ogilvie,—and, upon principle, I am clear that the whole officers concerned, the Fort Major, Crown Agent, and Lord Advocate, acted with great propriety. The pannel did not take the course pointed out by the decision. It is true, that the case of Nairn and Ogilvie does not in every particular apply here;—but in every case, even in cases in the civil courts, the designation of a man as present prisoner in a particu-

lar jail, is a common designation. Nor could there be any mistake here, unless there were a number of prisoners of the same name.

Lord Gillies. As to the consequences of disposing of this objection, I lay them out of my consideration. Let them be what they may, they ought not to affect our judgment on the present point. I do not sit here to judge of the propriety of the conduct of the officers. The fort-major, I should believe, to have acted with propriety; but that is not the question before us. And, I must own, that before giving any judgment on that which is before us, as I wish to avoid stating any thing that might be considered inaccurate, I should wish, before giving an opinion upon the facts, to have them ascertained by proof. For, it is very possible, that, in my notion of the facts, I may be inaccurate; and in any opinion I should deliver relative to them, the one or other party migbt tell me I was wrong. I am, therefore, against proceeding on supposition or on a general notion of them. I wish them ascertained.

As far as this is an objection to the designation of a witness, this is the proper and only period for having it brought forward. Mr Drummond will acquiesce in that.

The designation "prisoner there" is, *prima facie*, a good designation, as the pannel's counsel might go there and enquire who the prisoner is. But, the prisoner at the bar says, he was deprived of the means of doing so, and by the Lord Advocate. Whether that is true or not, I know not; and, till I know that, I shall not give my opinion.

Lord Pitmilly. My opinion is formed, but I shall defer giving it, till I find how the fact stands.

Lord Reston and Lord Justice Clerk said they had no objection to an examination of the fact.

Lord Advocate. A minute should be given in.

Mr Jeffrey. I am willing to give in a minute. My averment is, first, that this person, being under the custody of the governor of the Castle, an application was made to the authority there to get access to him.

Lord Advocate. A proof of nothing can be allowed unless there be a written statement upon the record of the

Court. I wish to state what I admit, and what I do not admit.

Mr Jeffrey gave in the following statement:

"Mr Jeffrey objected, and offered to prove, 1*mo*. That the witness in question being only described as present prisoner in the Castle of Edinburgh, the agent for the pannel applied in person to Major Martin Alves for access to him, which was refused, until some warrant or authority should be obtained from the crown agent; and at the same time the major stated to the agent, that he had peremptory orders from his superiors to refuse all access, except to persons having such authority. 2*do*. That the agent for the pannel afterwards applied by letter, which will be produced both to the crown agent and the Lord Advocate, requesting access in that character to this and the other witnesses in the Castle. 3*tio*. That, in return to these applications, he received a letter from the crown agent, which will be produced, stating, that he was directed by the Lord Advocate to decline granting any such permission, and that this was expressed without any qualification whatever, and in express and peremptory terms."

The Lord Advocate wrote and gave in the following answer.

"Advocatus answered, that when the prisoners were incarcerated in the Castle, he gave directions, that, in order to save trouble to the Court, under whose warrant they were detained, and under whose authority access to them might at all times, if applied for and found by their Lordships to be proper, be obtained; that it should be intimated to the officers in the Castle that he or the crown agent would extrajudicially grant his consent where no objections occurred, that persons applying to see them might be admitted, and by which the necessity of a formal application in every case would be prevented. That this was all the public prosecutor could do, or could be supposed to have done by such direction, having no power himself to exclude any person from the prisoners. That when applied to by the pannel's agent to be admitted to the other prisoners in the Castle, he directed the crown agent to intimate that he deemed it incumbent upon him to withhold his consent from such admission being granted, leaving it as matter of course to the pannel to apply, if so advised, to the Court, to obtain their Lordships' authority for obtaining such admission, but stating, that if that was made it would be opposed."

Copy—Letter from Mr Warrender to Mr Ramsay dated 15th July, 1817.

"Sir,

"In answer to your's of this date, I can only refer you to my former letters on the subject, not having since received any further instructions.

"I am, sir," &c.

Mr Jeffrey. You will bear it in mind that it is a part of my averment, that the actual custodiar stated, and shewed written authority for it, that he had no power to grant admission, under any other authority than that of the Lord Advocate.

Lord Gillies. Unless the Lord Advocate contradict what Mr Jeffrey has stated as to the fort-major, I think we are bound to hold the matter to be as stated by Mr Jeffrey.

I conceive this is the proper time for objecting to the designation of the witness.—It is not a direct objection to the designation. The situation of the witness was sufficiently pointed out, to enable the prisoner to go to where he was, and to apply to the commanders in the Castle, to see Campbell. I am clearly of opinion, that the prisoner was entitled to have access to John Campbell. He was entitled to have access to him, both to learn who the individual was, and in order to make enquiry as to the nature of the evidence he was to give against him. This is the law of Scotland. I do not say it is a matter of absolute right; but, *prima facie*, it is a right which every prisoner enjoys. If it should be stated in the proper quarter, that there are reasons against it in any particular case, the Court would refuse it, if it judged the reasons to be sufficient for the refusal. But standing, as this case does, we must presume that the prisoner was entitled to have access to the witness. This being the case, what does the prisoner's agent do? He naturally applies first to the commander of the Castle, and he is told he must have the authority of the crown agent, or of the Lord Advocate. He applies to them, and he is by them told they would give no such authority or consent. "The Lord Advocate deems it incumbent on him to withhold his consent, as public prosecutor," from the witnesses in the Castle "having any communication whatever with the agents of the pannel, should any other steps be taken to obtain that object." This

is the intimation by the Lord Advocate, that if application be made to this Court, he will not consent to that application. What, then, was the step to be taken by the prisoner? He should have applied to this Court, and then your Lordships, with or without consent of the Lord Advocate, would have granted access to this witness. I am not now entering into the question whether access would have been allowed for enquiry as to the nature of the evidence to be given by the witnesses at the trial; but to this extent, at least, the pannel had clearly a right of access—to learn who the witnesses were—to identify the persons named in the list served upon him. This application has not been made by the prisoner, ably assisted as he has been. If any bad consequences follow, the blame lies with his counsel, as he was not advised to make the complaint at the proper time. It is now too late. And the decision referred to would in point of principle have applied to the present case.

Lord Pitmilly.—This question as to the admissibility of the witness embraces two points. The first relates to his designation. The second relates to the application for access to him, made by the pannel's agent to his majesty's advocate.

The objection to the designation is, that the witness is designated "present prisoner in the castle of Edinburgh." That is no good objection to the designation, unless, as Mr Drummond stated, there were others of the same name there. There are many instances of such designations, which have been always considered sufficient, and therefore it is not a good objection.

The second objection is, that access to this witness was denied. As to that objection, I concur with what has just been stated, that this is not the proper time to bring forward such an objection. I did not think the proof on the subject was relevant; but when such an assertion was made, it was desirable for the Court and Jury to ascertain the facts. But if the Lord Advocate, or any other, refused consent for access, and if there was any claim for the prisoner to have access, application should have been made to this Court, and no time would have been improper for it but the present. If the pannel's counsel had applied yesterday, with these letters, and had stated their desire to have access to the witness, the Court would have considered the application. If they had done so this morning, before the jury was formed, the Court would have

given it consideration. But the only improper time for making the application is now, when the trial has commenced. It would be productive of evil consequences, if this objection were to be supported.

Lord Reston.—I am entirely of the opinions which I have heard from your Lordships. The objection as to the designation is not sufficient. Suppose the application had been made to a proper jailor, and he had refused to grant access, then this Court, on being applied to, would have ordered access to be allowed. But the Lord Advocate is not the jailor, and his refusal is no reason for not applying to your Lordships.

Lord Justice Clerk.—I am clear, now we have the facts before us, the objection ought not to be sustained by your Lordships. No such objection ever could be sustained, except when the prisoner would otherwise suffer injustice. But no injustice can be complained of by the prisoner before us, because the three letters by his own agent show that application was not made to the proper quarter; and though put on his guard that the consent of the prosecutor would not be given, although other steps should be taken in order to obtain access, yet the application never was made where it ought to have been. For though the Lord Advocate thought it right to refuse admission, he had not the authority to control the prisoner and prevent him from applying to us. If the commanding officer in the Castle, under the circumstances which here occur, had refused to comply with our order, he must have answered the refusal at his highest peril. We have equal charge and command over prisoners committed by our warrant to the Castle as we have with regard to persons committed to any of the common prisons; and it is impossible for any one to doubt, that obedience must have been given to our order for access to the pannel's agent and counsel. I would have granted access without hesitation upon proper application, and at any stage of the proceedings. Your Lordships would have listened to it this morning, if a statement had been made, that disadvantage had arisen from the want of access, and the trial would have been delayed. The present is the only improper time when application could have been made to your Lordships.

The Court pronounced the following interlocutor:

"The Lord Justice Clerk, and Lords Commissioners of Justiciary, having considered the said letters, they repel the objections, and allow the witnesses to be received."

(Signed) D. Boyle, J. P. D.

JOHN CAMPBELL was called, and the oath administered to him by LORD HERMAND.

LORD HERMAND.—Have you any malice or ill will at the pannel at the bar?

A. No, my Lord.

Q. Has any body given you a reward, or promise of reward, for being a witness?

A. Yes, my Lord.

(The answer not being distinctly heard, LORD HERMAND continued.)

Q. Has any body told, or instructed you what to say as a witness?

MR CLERK.—We have some questions to put on this matter.

MR JEFFREY.—Will your Lordship be so good as question him again? I don't think the answer was distinctly heard.

LORD HERMAND.—Do you hear, sir, what I say, and answer distinctly—Has any body given you a reward, or promise of reward, for being a witness?

A. Yes, they have.

LORD JUSTICE CLERK.—I think it right to warn the witness—You are now adduced as a witness in this prosecution for the crown. I am bound to tell you, that in reference to the crime which is charged by the prosecutor against the pannel, you are not in any parallel situation with the pannel, and it is not competent to bring you, for any concern you had in these transactions, to any prosecution, after your being adduced as a witness. It is necessary for you to tell the whole truth in as far as you know it relative to all matters as to which you may be asked now, or at any future stage of the examination. I have to admonish you, that, as to the questions now put, or that may be put, you are to disclose the truth, and nothing but the truth; and that as to your situation, you stand in no risk, unless you state upon your oath what is contrary to the truth. If you do so in any part of your examination, be assured, your being a witness will not prevent your receiving punishment. It is my duty to give you this admonition, and keep it in view.

WITNESS.—I am aware of the nature of an oath. Where I stand, I have called God to witness to the truth of what I assert, as I shall answer at the day of judgment. I am likewise sensible, that what I have now stated may be construed as proceeding from my concern with the pri-

soner, and that it may be thought I have taken this method in order to save him. It will probably be believed also, as to the persons who have given this promise, that their word should be taken before my oath. In my situation, if I can produce even presumptive proof, I hope to convince the world I do not perjure myself. I shall state the names of the persons, and the whole circumstances.

The witness's statement was ordered, on the motion of the Lord Advocate, to be taken down in writing.

Mr Jeffrey.—I am enabled to ask pointed questions of the witness. If I ask improper questions, the Lord Advocate may stop me.

Lord Justice Clerk.—The correct way of proceeding, is to desire the witness to explain his statement, and the prisoner will afterwards be allowed to put questions to him.

Mr Jeffrey.—I am satisfied.

Lord Justice Clerk.—I ask you to state distinctly and accurately the grounds which have made you make this answer.

Witness.—I will state the circumstances as *distinctly* as possible, and you will make allowance for my want of education preventing my going through the circumstances so well as a person would who has had the advantage of more learning. I cannot easily explain them without going back to the beginning. It will be necessary that I commence from my examination at Glasgow.

The following deposition was then taken down by the Clerk of Court.

"Depones, That he was apprehended alongst with the prisoner at the bar, he thinks, on the 22d of February last, without cause assigned, and without a warrant: That upon the Tuesday or Wednesday following, he was examined before the Sheriff-depute of Lanarkshire, and was interrogated, if he knew what he was brought here for: That he stated, that he did not know, and that the Sheriff insisted that he did, and it would be wisdom of him to make his breast clean. After some similar conversation the Sheriff went out, leaving the witness with Mr Salmond, and he is not sure whether any other person was present or not: That Mr Salmond came up to the witness, saying, 'John, you perhaps do not know that I know so much

about this affair;" and adding, "I know more about it than you think I do." Depones, That Mr Salmond added, "I suppose you do not know that I have the oath you took at Leggat's on the first of January?" He then shewed him a scroll of an oath, saying, "You see, John, I have got it;" adding, that "you and other persons (whom he named) took that oath in Leggat's on the first of January." The witness then told him, that he had not taken that oath.* Depones, that after several examinations before the Sheriff, and being often closeted with Mr Salmond, on one of which occasions, after using many entreaties to the witness, and these having failed, after railing at the prisoners as villains, who had betrayed him, the witness, and stating, that it was out of respect to him that he wished him to be a witness, Mr Salmond said, "John, I assure you that I have six men who will swear that you took that oath; and you will be hanged as sure as you are alive." Depones, That upon this he told Mr Salmond, that if he got six men to swear that he took that oath, they would perjure themselves. He answered, "John, John! it is impossible to get six men to perjure themselves."† Depones, That after this Salmond said, "John, you will ruin yourself if you persist in this way; but if you take the other way, you will do yourself much good." Depones, That after much conversation, the witness said he was not afraid of the one way, and he did not see much good he could do himself by the other. Depones, That Mr Salmond said the Lord Advocate was in Glasgow, and he would come under any obligation he chose, if he would be a witness. Depones, That

* The following part of the witness's statement was not recorded:—

"I suppose it is needless to go through any farther as to that part of the examination with regard to the ill humour shown me by the Sheriff, —threats held out to get me just to say that I would be a witness. I suppose I may come to the engagement between us?"

"LORD JUSTICE-CLERK.—Do you mean to say the Sheriff threatened you?"

"He run into arguments with me to confuse me—at one time about religion and other matters—at another time putting the same questions in different words that were taken down in my declaration before, and said such questions were not taken down before; and said, Supposing that to be the case, I am not satisfied with your answer, and I have a right to demand answers to the questions. I said, I was obliged to answer him, but that it was wrong in him to put questions to me in different language; and he told me I was impudent."

† What follows was not recorded.

"LORD JUSTICE-CLERK.—What did Mr Salmond say as to your receiving a reward or promise of reward?"

"A. It is necessary that I should explain the whole, as it comes along in a chain."

shortly after this he was taken before the Sheriff, when Mr Drummond, advocate-depute, came into the room; after which he was examined;—but the subject of the obligation was not then mentioned; and that in a few days afterwards the witness was removed to Edinburgh Castle. Depones, That when in the Castle of Edinburgh, Mr Drummond came to him, and mentioned that M'Kinley had been served with an indictment; and that his name was in the list of witnesses; and that now was the time for him to determine whether he would be a witness or not. That the deponent stated that he did not wish to be a witness; and that he, Mr Drummond, knew, that if he was, he need not go back to Glasgow, as he could not live there. Depones, That Mr Drummond then said that he was quite sensible of that, but that he might go and reside somewhere else; and that he might change his name: But the witness said he would not change his name; and that it would be much the same if he lived in any other manufacturing place as in Glasgow. Depones, That Mr Drummond then said, he had been thinking of a plan of writing to Lord Sidmouth, to get him into the excise; and that if he the witness chose, he would write to Lord Sidmouth, and shew him his answer. Depones, That he answered he did not choose the office of an exciseman; and remarked at the same time, it was probably the only office under Government he was capable for: That it was an office that exposed him to risk and ill-will, which he did not choose to encounter, as he had suffered enough from the public while a peace-officer. Depones, That at this conversation no person was present but the deponent and Mr Drummond; and that Mr Drummond was with him in the Castle alone at other times. Depones, That at the first interview, after what is above-mentioned, Mr Drummond asked him what he wanted to have: The witness remained silent, and made no answer. Depones, That Mr Drummond then said, that if he would give such information as would please the Lord Advocate, he should neither be tried himself nor made a witness. Depones, That he said that that was an uncertain matter, as he did not know what information they wanted, or that he could give more than they already had; and that if his information did not please the Lord Advocate, he would lie open to every attack that could be made against him. Depones, That Mr Drummond then said, "I do not know what to do with you, Campbell. I wish to do every thing I can to favour you. I shall give you a day or two to think of it." That Mr Drummond added, "do you wish I should call

back again?" That after some hesitation the witness said he might do as he pleased, and Mr Drummond went away. That in a few days afterwards Mr Drummond came back again, and said, "Campbell, this is the last time; you must be determined now." The witness asked if he had wrote to Lord Sidmouth, and Mr Drummond answered he had not, as the witness had rejected it. That Mr Drummond asked if he had made up his mind yet. Depones, That he answered that he had upon conditions; and upon being asked what these were, the witness told him he wished to get a passport to go to the continent: That Mr Drummond told him, he supposed there was nobody could stop him; and he answered, that being a mechanic, he believed the laws of the country did not allow him to quit it. Depones, That Mr Drummond replied with a smile, "Is that all? There is no question you will get that, and means to carry you there." Depones, That they were standing while this conversation took place; and the deponent said, that upon these conditions he would be a witness, provided his wife was also taken into consideration. Depones, That upon this, Mr Drummond said, "Campbell, let us sit down, that we may understand each other properly, as I would not wish that we misunderstood one another at the latter end." Depones, That the witness mentioned to Mr Drummond, that his wife was in a very delicate state of health, and had nothing but what she earned to support her; upon that question being asked by Mr Drummond, and that if it was known that he was to be a witness, she would suffer from ill-will by the public: That Mr Drummond then replied, poor woman, she must be ill off; and desired the witness to write a letter, and mark a one-pound note in it, and give it to Mr Sibbald, who would bring it to him, and he would put a one-pound note in it for his wife: That Mr Drummond also desired the witness to state to his wife, that he was to be a witness, and to desire her to leave Glasgow and go to the witness's father's at Symington, in Ayrshire. Depones, That he said that would be the first thing to discover that he was to be a witness, as his wife could not read write. Depones, That after some conversation about writing to the town-clerk of Glasgow, or some friend of the witness's, it was agreed that the witness should write a letter to his wife, stating that a friend of his had sent her a one-pound note, to pay her expences in to Edinburgh by the coach, and that she would receive money here to carry her back again: That this letter was given to Mr Sibbald, in consequence of the conversation with

Mr Drummond, but that some days afterwards it was brought back by Mr Drummond, who told him, that the Lord Advocate disapproved of sending such a letter, but thought it more proper that Mr Salmond should be written to, to send for the witness's wife, and tell her that he wanted her to come to Edinburgh. And after this, Mr Drummond read to him a letter he had received from Mr Salmond, stating, that a ticket had been bought; but a postscript of the letter mentioned that his wife, from her state of health, declined to come: That Mr Drummond returned the witness's letter, which he burnt. Depones, That he was informed by Mr Drummond that the Sheriff was coming to examine him, and that it was agreed upon, that, in answer to the first question, he, the witness, was to state, and have it taken down, that he was to receive a passport to the continent, and the means to convey him there, it being understood that Prussia was to be his destination: That the Sheriff, and, as he believes, the Sheriff-Substitute, the Solicitor-General, the Procurator Fiscal of Edinburgh, as he understood, and a clerk, came into the room; and Mr Drummond having asked, "Campbell, what have you got to say in this business?" the deponent answered, that, supposing he was concerned in that affair, and was to tell the whole truth, that he did not consider either himself or his wife safe; and that, without his getting a passport to go to the continent, and the means to carry him there, he could not be a witness; upon which Mr Drummond, turning to the Solicitor-General, said, "Answer you that:" That the Solicitor-General then ordered the clerk to write these words, as he thinks: "Whereupon the Solicitor-General assures the declarant, that every means necessary will be taken to preserve him and his wife, and that he will get a passport to quit the country or go to the continent, (he is not sure which,) and the means to carry them there:" That during this time, the Sheriff was walking up and down the room, which is a pretty large one; and when the above words were taken down, he was desired to come and sign this. Depones, That the Sheriff came and sat down at the table; and, after perusing the paper for some time, said, "I will not sign this;" and added, "that, as he was an officer of the crown, it was his duty to see justice done; and he could assure the witness, if he was to sign that paper, he would not be answerable for it for a good deal; for that, if the deponent was brought to his oath, and should swear that he had received no promise of reward, and this paper signed, he would perjure himself:" That the witness an-

swered, "No, if it was considered as a means of his preservation;" upon which he was supported in the same argument by Mr Drummond; upon which the Sheriff said, he would sign no such paper: That Mr Drummond then proposed, that it should be put down that he was to get the means of carrying him to any of the British colonies, in place of going to a foreign kingdom; but the Sheriff also refused that, and added, "that he was willing every thing should be set down for the preservation of him and his wife, but nothing further:" That after the Sheriff had stated this, there was a pause for some time; when Mr Drummond, looking at the deponent, said, "Campbell, you know whether you can be a witness on these terms or not." The witness remained silent; and some time after Mr Drummond said, "Now, Campbell, do you believe that we can do that for you which you expect, without its being set down in the paper?" and that at this time, as he thinks, the Sheriff was sitting at the table, the Solicitor-General and Mr Drummond standing at the fire, and the other gentlemen walking about the room: That the witness answered, he knew they were able if they were willing; to which Mr Drummond replied, "Could he rely upon them for that?" The witness answered, "May I?" Mr Drummond answered, "You may;" and that the witness said pretty loudly, "Well, then, I shall rely upon you as gentlemen." Depones, That shortly after this he was allowed to write his declaration himself, all excepting one part relating to a Mr Kerr: That, a few days after this, the Sheriff, the Procurator Fiscal, and a clerk, came up to have his narrative signed, which was done; upon which the Sheriff said to him, "Campbell, after you have got clear of this, you had better go home to your loom, and let them rule the nation as they please:" That upon this the deponent said, that rather than go back to his loom he would be served with an indictment himself, even after all he had written: That the Sheriff answered, "he had nothing to do with that—it remained between the witness and others." Depones, That he was visited by Mr Drummond after this, who ordered Captain Sibbald to get him plenty of books, and that he has read near an hundred volumes since that time: That, about a fortnight or three weeks ago, he wrote a letter to Mr Drummond, that he was in need of a pair of shoes and a pair of trowsers, and that his wife was in need of money. Depones, That he did receive a pair of shoes from Captain Sibbald, by the orders of Mr Drummond, as Captain Sibbald said, but that he could not then get any money, but that, as soon

as the first trial was over, he would get money: That he wrote another letter to Mr Drummond, stating part of what was in his declaration, as a gentle demand for money, and received the same answer, that he could get no money at present, but that he would get some after the first trial was over; and that he, Sibbald, told him he had got this answer from Mr Drummond. Depones, That although their engagement is not in writing, in consequence of the interference of the Sheriff, and which writing was immediately burned in the Sheriff's presence, he considers it still a subsisting private engagement, upon the performance of which he thinks himself entitled to rely; and that the declaration, which he signed and gave to the Sheriff, was made upon a reliance on that engagement. Depones, That at the conversation with Mr Drummond, when he got an order to get the books, he was then cited as a witness on the trial of Andrew M'Kinley, and the first book that the deponent received from the library, in consequence of that order, was upon the 22d day of April last. Depones, That he was not cited as a witness at the time he signed and delivered his declaration to the Sheriff, and that the conversation about the books took place in the week that Mr Drummond went to the Circuit at Glasgow. Depones, That the first idea of apprehension of h[illegible]*being* in danger was suggested to the deponent by the Sheriff and Fiscal at Glasgow, who asked him, if the reason why he would not be a witness was, that he considered his life to be in danger? That he cannot say that he considered his life to be in danger, but that he did not choose to go back to Glasgow after being a witness. Depones, That he did not tell Mr Drummond that his life was in danger, as Mr Drummond seemed to be impressed with that idea, and the deponent continued to carry it on. Depones, That in the conversations above-mentioned with Mr Drummond, or any of the other gentlemen, there was no attempt whatever made to instruct him in any way as to what he should say in giving evidence as a witness. All which is truth, as the deponent shall answer to God.

(Signed) "JOHN CAMPBELL.
"D. BOYLE, J.P.D."

Mr JEFFREY.—If I understand, on the part of the prosecutor, that the facts now disclosed, are disputed, I am prepared to corroborate them, by the examination of the persons pointed out in the deposition which has just been given. And, in particular, in that event, I should wish now to call for the examination of the Sheriff, Sir William

Rae, that the accuracy and veracity of this witness should be established.

Lord Justice Clerk.—In the view in which this examination presents itself to my mind, it does not appear to me necessary to proceed in this investigation.

Lord Advocate.—I should think, after what has been sworn to by this witness, the statement of Sir William Rae should be given to the Court, and the Court will then determine what line of proceeding should be followed. It will then be for me to consider what line I am to adopt; but till this inquiry be finished, I am not called upon to say what I am to do.

Lord Justice Clerk —Your Lordships will say if this inquiry is to be gone into.

Lord Hermand.—Either this man's statement is true or not. If not true, what sort of witness have we here? If it be true, which I disbelieve, for the promise of an office in the excise, and the promise of writing to the Secretary of State, I don't believe; but, if true, the objection to his evidence being received, must be sustained. We are in an equal dilemma against receiving him as a witness, whether his story be true or false.

Lord Gillies.—I concur in the opinion which Lord Hermand has given. I should wish very much to have Sir W. Rae examined; but the Court is sitting to try the case of M'Kinley, and it is our duty to proceed in this trial, and examine no witnesses whose evidence cannot affect the result of the trial. If five hundred were examined, say what they like, this man is disqualified from giving evidence. He is disqualified in every way, whether what he has said is true or not. Besides, he has sworn that he considers himself under an engagement, having influence on him, and connected with this trial. Under these circumstances, I cannot go farther into the inquiry. It may be a subject for consideration afterwards, whether any proceeding should be had in regard to the witness; but, at present, it could not lead to any thing towards forwarding the trial.

Lord Pitmilly.—We must attend to the precise point which is before us. All this has come out in the questions put by the Court, *in initialibus*, to this witness, and we are now in an enquiry whether the evidence of Sir William Rae is to be received. I, for one, am of opinion, that

it is not *hujus loci* to enter upon this inquiry, and that it is not competent to examine Sir William Rae at present.

Lord Reston.—I concur in thinking that Sir William Rae cannot competently be examined.

Lord Justice Clerk.—The opinions now delivered are to the same purport with what I was going to state. However anxious your Lordships may be with regard to them, this is not the stage to proceed in an examination of the statements made by the witness; for I am clear, that, even supposing you were to have the most satisfactory evidence, that he has not correctly stated any one of the conversations which he has detailed, he cannot be received as a witness, for he has sworn he is acting under an engagement which he holds to be binding. Therefore, there can be no farther examination of him in this trial.

Lord Advocate.—Your Lordships will indulge me with saying, that this mode of proceeding abridges the discretionary power competent to me with relation to pressing the examination of this witness. I have expressed my anxiety that Sir William Rae should be examined; and after his examination was closed, it would have been for me to have said whether I wished or not that the witness should be examined or withdrawn. It would have been within my competency then to have stated, that I did not desire a judgment of your Lordships upon the admissibility of the witness Campbell. As it is, it only remains for me to say, that I am satisfied that whatever might have been the evidence of Sir William Rae, after what has been said by the witness, besides what I have now heard from the Court, I would not have considered it as my duty, as public prosecutor, to have pressed the evidence of this witness upon your Lordships; and my wish for examining Sir William Rae arose from my feeling of what was due in justice to persons whose names have been mentioned.

One thing, as I am up, you will allow me to say, that I myself have not been in the city of Glasgow for two years.

Mr Jeffrey.—I wish a statement on the subject to be made on the record.

The following minutes were then given in:

"Jeffrey for the pannel, represented, that if the truth or accuracy of the statement now given in the initial deposition of this witness, was not admitted by the prosecutor,

he was ready and desirous of corroborating the statement by other witnesses, and accordingly begged leave, in the first place, to call for the evidence of Sir William Rae, upon the points alluded to in the preceding deposition."

"Advocatus answered, that he was no less anxious than the Counsel for the pannel, that the evidence of Sir William Rae should be taken. Without this evidence the true state of the facts, and of the conversations alluded to in the foregoing deposition, could not be precisely ascertained. That the precise import of these alleged conversations must be ascertained before the nature and effect of the legal objection could be distinctly estimated: That he had no intention to press the examination *in causa* of this witness upon the Court; and even after the testimony of Sir William Rae should be taken, it was his intention to withdraw the witness."

The Court declined going into any investigation in this matter.

The witness was then withdrawn.

JOHN M'LACHLANE sworn—Examined by Mr DRUMMOND.

Q. Do you know the prisoner at the bar?

A. Yes.

Q. Do you know a person of the name of Hugh Dickson?

A. Yes.

Q. Do you remember meeting the pannel at the bar at the house of Hugh Dickson, in the Calton of Glasgow, in the month of December last?

A. I could not say whether November or December.

Q. You remember a meeting at his house?

A. Yes; but not the time.

Q. In the month of December?

A. I rather suspect November.

Q. Before the New Year?

A. Yes, a considerable time; I think November.

Q. Who were present there?

A. I could not say altogether.

Q. Could you mention some of them?

A. One John Campbell and Hugh Dickson.

Q. Who else?

A. One Gibson—Peter Gibson. I could not say I can recollect their names; but I think they were all present.

Q. Was the meeting in the evening?

A. Yes.

Q. What was the purpose of it?

A. To consider whether it was prudent to commence Reform Societies, as they are called.

Q. Describe what was done at that meeting?

A. What I recollect. After some altercation taking place, some one was introduced by Peter Gibson, who told us there were some societies about town, who would wish others were formed, and that if we would agree to form societies, they would correspond with them.

Q. Others of the same kind?

A. He said he understood so. And the question being put——

Q. Go on.

A. It being allowed by the same individual, that it was necessary they should promise secrecy, there was some altercation upon that subject. The ground stated then for secrecy was; that, as it was hinted, for some time previous, in the London newspaper, the London Courier, that the Habeas Corpus might be suspended soon after the meeting of Parliament for dispatch of business; and as it was generally understood that a very small crime might be the cause of throwing a man into prison; at least if any unguarded expressions were used, no one therefore should hurt his neighbour for such unguarded expressions. Any member might use unguarded expressions; and his neighbour should promise not to hurt him for such unguarded expressions.

Q. What was done in consequence of this talk of secrecy?

A. I was going to proceed, if you please. Then it was proposed an obligation should take place. This was objected to by some, as we did not know how other societies did, or what they were about. All we could do was to promise not to hurt them, till we should know what they were about, and see what were the grounds or meaning of the other societies, or what rules they had.

Q. Well, sir?

A. I recollect the preses (I do not remember his name) put it to the vote, and that those for secrecy should hold up their right hand.

Q. How was it decided?

A. It was agreed, with the exception of one man, for secrecy.

Q. Who was he?

A. Mitchell, I think; but I could not be positive.

Q. What was done next?

A. Each individual shook hands. There was a shake of hands in confidence, that nothing was to be revealed of any information given them by other societies; and that no one was to hurt any individual.—Then there was an appointment of two individuals.

Q. Do you remember who they were?

A. I was one. I do not remember the name of the other.

Q. What were they to do?

A. To wait upon the Glasgow Reform Committee, to see what information they could give them.

Q. Was that all that was done that night?

A. That is all that I recollect was done that evening.

Q. When was the next meeting?

A. Before I go forward, I suspect, I should give what took place afterwards before any other meeting.

COURT.—It is what you know that you are to tell us.

A. What I know took place as to myself. Before I got time to call upon the Glasgow Committee, there was one of the members called upon me.

MR D.—What was his name?

A. Alexander Richmond. He called upon me, and asked, what was our Reform Committee about now? I told him, I was not an active member, or member of the committee. He said, they would be as lax, he supposed, as the Glasgow Committee. I told him, I was glad to see one of the Committee, as I had been appointed to wait on them; and I asked what were they to do? Did they mean to petition? or what were they to do?

Q. Go on to the next meeting.

A. It took place in M'Kinley's house. Those I was connected with——

MR JEFFREY.—There is no meeting in M'Kinley's libelled.

MR D.—Do you remember a meeting upon the first of January?

A. Yes.

Q. Where was that held?

A. In one Leggat's.

Q. Where does Leggat live?

A. In Tradestown.

Q. Was that meeting in the evening too?

A. Yes.

Q. Can you tell us who were present?

A. Campbell, Dickson, M'Kinley.

Q. This man? (pointing to the pannel.)

A. I remember seeing him there.

Q. Do you remember any more of them?

A. Yes, one of the name of Somerville.

COURT.—How many of them altogether?

A. A dozen, or perhaps more.

MR D.—Who was preses of that meeting?

A. I think a man of the name of Pate. But as I was a little intoxicated that evening, I could not be positive upon that point or any other. I was the worse of drink.

Q. Do you remember any thing about an oath at that meeting?

A. To the best of my recollection, there was a paper wrote that night, called a Bond of Union. I never heard it called an oath till after I was made a prisoner.

Q. What was the nature of it?

A. I could not repeat it at present. It was about persevering in demanding a reform in Parliament, or at least in petitioning for it.

Q. Who read it?

A. I could not be positive. I believe it was read by one or two.

Q. Do you remember any of the words.

A. If I heard them read perhaps I could.

Q. You said it contained something about petitioning for a reform in Parliament?

A. Yes. Please to read it, and I will say what I remember.

Q. Was any particular species of reform wanted?

A. To obtain the elective franchise at the age of twenty-one.

Q. Who were to get it?

A. Those, I suppose, who were to be considered worthy of it.

Q. Was it for any particular description of persons, or was it a general thing?

A. I recollect nothing more than the elective franchise at the age of twenty-one.

COURT.—Was it to every body?

A. Insanity was one thing, crime was one thing, that was to disqualify a man, I understood. If he was disqualified by crime he was to have no right.

MR D.—Was insanity to disqualify him?

A. I could not be positive; but I believe it would do it. But I do not remember whether it was in the paper or not.

Q. Do you remember any thing else of the nature of this bond of union?

A. Yes, there was one thing. There were none that were to come into this society that were to hurt any of their brethren in the same society.

Lord Hermand.—What do you mean by hurting?

A. By giving information.

Mr D.—Do you remember any thing more of the nature of the promise?

A. I could not say at present.

Q. Was it said what was to happen if they broke their promise?

A. They were to be considered as traitors, or something to that purpose.

Court.—If they should give information?

A. Yes.

Mr D.—Was it said what was to be done to them?

A. Not that I remember in that paper.

Q. In any other?

A. I saw one in Court.

Q. But at that meeting?

A. I recollect none. They were to be accounted traitors, and to be used as such.

Court.—To be used as such?

A I understood so.

Q. You remember it?

A Yes—that is, to the best of my recollection. It is from a copy I saw of it next day that I speak.

Mr Grant.—He was not sober at the meeting, and does not speak from his recollection of what took place then, but from his recollection of a paper which he saw afterwards.

Court.—Are you stating to us your recollection of what passed?

A. The last part, I observed to you, as to traitors, I do not remember at Leggat's, but from a paper I saw next day. There were other papers read, as a speech prepared for some reform-meeting. They were strangers to me, except a few that I just now named.

Lord Hermand.—Was any thing said at that meeting as to the means to be employed?

A. I never understood any of their means, but by that of persevering in petitioning.

Lord Justice-Clerk.—You will understand we should have warned you, that, by being brought here as a witness, you cannot be brought to any trial for those transactions, and that you are now in no hazard if you speak the truth. Having been brought here as a witness, you are

bound to speak out the whole truth, without regard to any obligation that may have been taken from you at any former time, or for any thing that was ever said to you.

Mr D.—You said you were a little the worse of liquor.

A. I was, before going to the meeting; and I became a little sick after I was there.

Q. You were not so drunk you could not recollect what passed?

A. I was not insensible altogether, but it hurt my recollection.

Q. Do you remember any thing farther than what you told us passed at that meeting?

A. I recollect of the words, moral and physical force or strength, or something; moral or physical strength, I think.

Lord Hermand.—Was that in the bond?

A. I understood so. It is from the paper I am speaking.

Q. Was it in the bond?

A. To the best of my recollection.

Lord Justice-Clerk.—You heard it at Leggat's?

A. Yes.

Mr D. How was this expression used in that bond? How was the moral strength to be applied?

A. Any explanation I can give is, I understood it merely to mean, they were to use great efforts, by reasoning and all the means in their power, to effect a reform in Parliament.

Court.—Repeat your words, sir.

A. To convince of the necessity of a reform in the Commons House of Parliament.

Mr D.—How was the physical strength to be applied?

A. By the expression physical strength, I understood from the reasoning that took place, that I was bound to assist personally in preparing and forwarding petitions for the like object; or subscribing sums, as the case might require,—subscribing as much money as possible, to defray the expences of forwarding and preparing the petitions.

Lord Advocate.—You said you are not quite sure whether the words are physical force, or strength?

A. To the best of my recollection, strength.

Q. Do you employ them as meaning the same thing?

A. I do not presume to be a judge in the language.

Q. If it had been physical force, would you have——

(Lord Advocate interrupted in putting the question, by the opposite counsel objecting.)

Lord Advocate.—I am entitled to ask——

WITNESS.—They may be synonymous; but I am not a judge of language.

Q. Did you understand subscribing money to be exerting physical strength?

A. I understood, that if my physical strength was not to be employed the other way, I was to subscribe; that, if I were not called upon to act personally, I was to pay those who were to act personally.

Q. Did you see any paper taken that night out of any person's pocket—by the prisoner out of his pocket?

A. I could not say so.

Q. Did you see him produce a paper?

A. Yes; I saw him have a paper in his hand.

Q. Was that paper read?

A. I understood it was read.

Q. Did you hear it read?

A. To the best of my recollection.

Q. What was it about?

A. On the same subject—reform in parliament.

Q. What did it say?

A. I could not be positive.

Q. Do you remember nothing about it?

A. It was like the rest of them—about a reform in parliament.

Q Similar to the bond of union?

A. No; I do not think it was similar to it. I think it was longer than it, for one thing.

Q. What was it about?

A. About a reform in parliament; but I am not able to recollect.

Q. Did it contain any of the words you have spoken of?

A. I do not remember.

Q. Any thing like them?

A. I could not say. There was a paper read by them before it, which was laid aside, and a new paper ordered to be read for the commencement. After these two were read and laid aside, there was a long speech, five or six sheets, which had been prepared to be read, or which had actually been read, at some reform meeting.

Q. Was the bond of union, which you told us of, approved of?

A. No; I do not think it was.

Q Any written that night?

A. I understood it was written.

Q. Did you see it?

A. I do not recollect that I saw it; but I understood afterwards.

Q. Was there any body president?

A. One M'Dowall Pate, I think, to the best of my recollection.

Q. Did M'Dowall Pate read aloud in your hearing any paper?

A He did read the bond of union, of which I have spoken.

Q. And, what did the others do when it was read?

A. To the best of my recollection, there was some amendment proposed, which, I understood, was added afterwards; but, to the best of my recollection, I was out at the time.

COURT.—Q. Was it proposed in your hearing?

A. Yes.

Q. In your presence read by Pate?

A. Yes.

LORD ADVOCATE.—Q. Did they sit still or rise after the reading?

A. They sat still, I believe.

Q. You did not hear it read when they stood up?

A. Yes, but not at that time.

Q. You came back again?

A. Yes.

Q. You heard the paper read over as agreed to?

A. Not by the same individual, but another at the other end of the table; his name I do not know.

Q. What then?

A. The preses ordered every one who approved of the paper to signify so, by holding up their right hand.

Q. Do you know a person of the name of Edgar?

A. I have seen him once since I was made a prisoner.

Q. Did you hear him read?

A. He read it once, and so did the preses. Both read it, and amendments were proposed. He who read it the third time sat beside Edgar, or where he sat before I went out.

Q. You said they stood up; and each was to signify his approval of the bond of union by holding up his right hand?

A. I did so, and I understood each did so.

Q. What did you do?

A. I gave my approval to it, by holding up my right hand.

Q. What do you mean, by giving your approval?

A. I became a member of that society, bound as I have explained, I understood it.

Q. How did the paper begin?

A. To the best of my recollection, it began with "In the presence of Almighty God."

Q. Did it end with the words "Almighty God?"

A. I do not positively remember; but, I believe, it ended with "help me, God," or something to that purpose.

Q. Was there any thing in it about brotherhood?

A. I do not remember.

Q. Try to recollect whether there was any such word in it?

A. Yes; I dare say there was.

Q. Brotherhood of affection?

A. Something like that.

(The Lord Advocate was interrupted by Mr Clerk,)

Lord Advocate.—I must not be interrupted.

Mr Clerk.—You must be interrupted when you put incompetent questions.

Lord Justice-Clerk.—The Court will prevent questions from being put that are incompetent; but none such have been put. The question, Was there any thing in the bond of union about brotherhood? is not incompetent.

Lord Advocate.—Did the witness add brotherhood of affection?

A. I think there was something of that kind.

Q. Was there any thing about confidence in it?

A. I could not say I recollect of that word.

Q. Was there any thing like it, or of the same meaning?

A. I could not say that I remember.

Q. Was there any thing about the punishment of death in it?

A. Not that I recollect of. There was, in one I saw after I was a prisoner.

Q. Speak to what you heard that night, and the bond to which you became a member. Was there any thing about equal representation in it?

A. Yes, I think there was—that was in it.

Q. Any thing about annual parliaments in it?

A. Yes.

Q. You have said, persons were to be considered as traitors, in certain circumstances. Did this bond of union, or whatever it is, bear that any punishment should be inflicted on them?

A. Not that I remember. It held up as traitors, or detestable characters, those who should give information, upon what I have said.

Q. You have said, that there was in this bond, or what-

ever it was, the words Almighty God—that it began with the name of God—What were the words before?

A. In presence of Almighty God.

Q. Was there any thing about hopes or fears, or rewards or punishments?

A. Yes; I think these were in it—hopes—fears—rewards—or punishments.

Q. How applied?

A. That no man should become a traitor for the sake of reward—that no man should become a traitor to his brethren who composed the society.

Q. Was the word stedfast in it?

A. Not that I remember.

Q. You have stated, the words equal representation and annual parliaments were in it, and also that the terms moral and physical strength were in it; was there not something also about endeavours?

A. Yes; endeavours to obtain all in our power.

Q. How were the words I have now mentioned, and annual parliaments, and universal suffrage, connected?

A. I do not remember at present the way they were connected. They were all in the same paper.

Q. In the same paper, which began with Almighty God?

A. Yes.

Q. Do you remember the word awful?

A. I do not remember of the word awful.

Q. When you held up your hand, in order to testify your becoming bound to that soeiety, and becoming a member——

Mr Clerk.—You cannot be allowed to assume so from what the witness said.

Lord Advocate.—The assuming is not upon my part.

(Witness removed.)

Mr Clerk.—As I understood the witness, the substance of what he said was, that they did stand up, and some held up their hands, and some held them down. Examine the witness again; for he has not yet said, that by holding up his hand he approved the oath.

Lord Justice-Clerk.—The words I took down are,

(Here his Lordship read from his notes.)

Mr Jeffrey.—There was only one putting up of hands.

Lord Gillies.—My recollection concurs with your Lordship's notes. And I suggest the propriety of learning

from this witness, as I am not sure of it, whether he was speaking from what he remembers passed at Leggat's, or from his recollection of what he saw the day following.

LORD ADVOCATE.—I beg leave to state, that I wish to know nothing but what he does remember of that meeting.

(Witness returned.)

LORD JUSTICE-CLERK.—I wish to state, that the Court expects you to say distinctly, whether you are speaking as to the terms of the bond solely from your recollection of the meeting at Leggat's, and not from any recollection upon seeing any other paper?

WITNESS.—I think I have made the difference always to your Lordships, by stating when it was from something else. All the answers have been as to Leggat's, where I did not mention any other place.

LORD ADVOCATE.—At the time you stood up and repeated these words, and held up your hand, and approved of the bond, and became bound as a member of the society, was M'Kinley present?

A. I believe he was, but I could not declare it upon oath.

Q. Have you any doubt he was present, from your recollection?

A. He might be out at the time, but I have no doubt he was in. He was out, but I believe he was in at that time. I think so, but could not be positive.

Q. Did you hear M'Kinley, or any body at that meeting, say from what the copy of that paper was taken?

A. I heard some of the meeting say, at one of the meetings, that it was similar to what was used in Ireland; and there was some alteration made on that account, as their object was only to employ legal means, and the other had different means in view. That was the cause of the alteration, as I understood.

Q. Do you remember whether the words, moral and physical strength, were in the first time the bond was read?

A. I do not remember, but I understood they were in the last time.

MR DRUMMOND.—Do you know Leggat himself?

A. I could not say I am acquainted with the man.

Q. Was there any liquor at the meeting that night?

A. Yes.

Q. Who brought it in?

A. The man of the house, I understood.

Q. Could you know him, if you saw him?

A. I do not know but I should.

Q. Do you see him in the Court?

A Not at present.

(Three men were produced, one of whom was Leggat, whom he recognized.)

Q. Were you at a meeting on the 4th of January?

A. Yes.

Q. Where was it held?

A In Neill Munn's.

Q. Where is that?

A. In the New Town of Glasgow. I could not name the street.

Q Who were present at that meeting?

A There were these individuals, Gibson, Dickson, and M'Kinley.

Q. What time did you go there?

A. Half-past nine o'clock, as near as I recollect. It might be twenty minutes from ten; but near that time. I think the 4th of January.

Q. Who was preses at that meeting?

A. I think he who was preses the night before.

Q. Pate, you mean?

A. Yes.

Q. How long were you at that meeting?

A. About half an hour, I think?

Q. What was done?

A. Some delegation was spoken of. M'Dowal Pate volunteered, I think, to go out to a place called Carmunnock, to see if some friends and acquaintances of his there would agree to form a society, similar to that then met, which commenced, I understood, the 1st of January.

Q. Were any others present, than those who were present at the former meeting?

A. Yes, many who were strangers to me. I saw none initiated That was the term generally used.

Q. What do you mean by initiating?

A. Becoming members of the society—signifying their approbation of the bond.

COURT.—What is your explanation of initiate?

A. Doing the same as I had acted myself upon the 1st of January, by holding up the right hand to that bond. That is what I understood by initiating.

Q. You said, many of those others, you did not know?

A. Yes. The room was pretty full, when I went in—not having room to sit.

LORD HERMAND.—Not room to sit?

Mr D.—Initiate was the common word for the purpose you explained?

A. I heard it used.

Court.—Did you hear that word used at that meeting?

A. No.

Mr D.—Did this man, Pate, sit at the head of the table? or where did he sit?

A. He was standing, when I went in.

Q Had he any particular place, as preses?

A. I could not say whether the side or head of the table was to him.

Q. How do you know he was preses?

A. He was addressed as such.

Q. Was there any vice-president, or secretary?

A. None that I recollect of.

Q. No other officer, with any duty to perform?

A. None that evening, except the pannel, who as collector received eighteen pence, which was over the reckoning.

Q. Collector of what?

A. Collector to collect the reckoning, or for any thing that might occur.

Q. What was to be done with the money?

A. I could not say. It was for the reckoning; and the meeting allowed him to keep what was over.

Court.—Was he called collector?

A. Yes. The 1st of January he was appointed. He, or the person who had the office, was to keep what was over, as some individual might be out of a sixpence, when he was called to pay the reckoning.

Lord Hermand.—How much had you to pay your self?

A. I think sixteenpence.

Q. Upon the 4th?

A. Yes.

Q Do you know whether any were present at that meeting who were not initiated?

A. I do not know. I heard no remarks made.

Lord Justice-Clerk.—He said none were initiated at this meeting; but persons were present who were not at the meeting of the 1st of January.

Mr D.—Were you at any other meeting after that?

A. I believe I was at some other meeting. I do not remember particularly.

Q. Were you at a meeting at Robertson's?

A. At Robertson's, I think, in the Gallowgate.

Q. How long was Robertson's meeting after the other?
A. I could not positively say.
Q. A week?
A. A week or two; but I do not positively recollect.
Q. Was M'Kinley there?
A. I do not remember; but I think he was.
Q. What was done?
A. I do not remember any thing particular that was done.
Q. Did M'Kinley keep a copy of the bond of union?
A. I could not be so particular. I never saw him have it.
Q. Did you ever hear him say he had it?
A. I never heard him say so.
Q. Who were in Robertson's?
A. A number of persons. John Campbell was there; and Dickson and James Hood were there; and a number of others, whose names I do not remember.
Q. Was Simpson there?
A. Never that I saw.
Q. Was Finlayson there?
A. No.

Q. Were you at the meeting at Hunter's?
A. Yes, upon the 22d of February, when I was taken up; never before.
Q. Before I have done with you, I wish to ask you, to try to repeat, as far as your memory serves you, the way the bond was expressed. Begin.
A. In connection, I could not repeat it. There were annual parliaments, equal representation. There were these words—Hopes, fears, rewards, and punishments, were in it; and there was something about brotherhood of affection. I could not take it in connection. These words were in it.
Lord Hermand.—Were any false names assumed by any one?
A. Yes; one by Gibson, and one by M'Kinley.
Q. What did he call himself?
A. Brotherstone, or some such name. Gibson did so too; he called himself M'Kinley.

Cross-examined by Mr Jeffrey.

Q. How many were at Munn's?
A. I could not say.
Q. A hundred?

A. No.
Q. Twenty or thirty?
A. I could not say.
Q. Was it a large room the meeting occupied?
A. No.
Mr Jeffrey.—I have no more questions.

Lord Advocate.—Were the words, declare and swear, in the bond?
A. The word declare was in it. It was at the beginning.
Q There were the words, Almighty God, and then the word declare after them; how did the words run?
A. I know declare was immediately after Almighty God; but how the words were used, I do not know.
Q. Did you understand you used the word declare?
A. Yes, that it was in the bond.
Court.—Do you recollect any thing of the word swear in it?
A. Not that I recollect of; but, the word declare, I recollect.
Q. Explain in what way the preses directed the holding up the hands?
A. The words were: All who approve of the bond, as it now stands, will signify the same, by holding up their right hand.
Q. This was after it was read?
A. Yes, after it was read the third time.
Q. Attend to this question—Am I to understand, that, by your complying with this question, that was put by the preses, by holding up your hand, you mean to convey to us, that that was being initiated?
A. Yes.
Q. Do you recollect any thing more being said by the preses, either before or after he put that question about approval by the holding up of hands?
A. No—except his part in general conversation.
Q. Am I to understand from you, that this proceeding, which took place at Leggat's, was the only occasion when you saw this bond approved of, in the way you mention; or did you see it done at any other meeting?
A. At none of those meetings I was talking of.
Lord Hermand—Did you ever see it done at any private meeting?
Counsel for the Pannel.—That is not in the libel.
Mr D.—The gentlemen opposite have not attended to the indictment, in objecting to this question.

Lord Advocate.—Did you ever at any time see the question of approval put in the same way as at Leggat's?

(Objected to by Mr Clerk.)

A. I never recollect it being put when the pannel was present.

Lord Advocate.—I wish to ask the witness, whether he, at this moment, considers himself under the obligation of this bond of union?

A. By no means.

PETER GIBSON *called.*

Mr Jeffrey.—This man proposed to be adduced in evidence, is liable to convulsion and epileptic fits, which have so far weakened his memory, as to render him an unfit witness in such a case as the present. We can prove, by those who have known him from his infancy, that his evidence is not to be relied upon.

Lord Advocate.—The objection relates to epilepsy. It is quite common to men of the greatest talents. Julius Cæsar was liable to it. Buonaparte has been said to be liable to it, as well as another great military commander the Archduke Charles. Do our learned friends mean to say, that none of these personages could have given testimony in a court of justice? I apprehend this to be impossible. If so, your Lordships cannot admit a proof of this allegation in the terms in which it is made.

Mr Jeffrey.—It is in the knowledge of all mankind, that this disease impairs the faculties of the mind.

Lord Advocate.—Is it meant to aver, that Gibson is *non compos mentis?*

Mr Clerk.—We do not say, he is an ideot; but we make an averment that he is subject to a well known disease, which weakens the intellects to an extraordinary degree. And suppose we should not be able to establish this fact to such an extent as to induce you not to receive his evidence at all, we may do it to such an extent as to satisfy your Lordships and the jury, that the witness, if examina-

ble, is yet entitled to very little credit or belief with a jury. Having said these few words, I need not trouble you with a long harangue, as I never heard such an objection opposed *in limine*.

LORD ADVOCATE.—I merely wish to know what is asked to be proved, and I desire to see the allegation in writing upon the record.

JOHN CLERK was called as a witness for the pannel.

LORD ADVOCATE.—Till this moment I was not aware of this evidence. The witness is not in the list of witnesses furnished by the prisoner. I do not object on this account to his evidence, though I might do so; but he is not in the list sent me even last night.

(Witness sworn).

MR COCKBURN.—What are you?

A. A cotton-spinner, in the summons I received.

Q. What are you?

A. Sometimes I am designated by that name, and sometimes by the name of merchant.

Q. Do you know Peter Gibson?

A. Yes, I do.

Q. Was he ever in your employment?

A. Yes.

MR JEFFREY. You know Peter Gibson?

A. I do.

Q. Do you know whether he is in a sound or an infirm state of health.

A. He was for several years in my employment previous to the month of March. I was told he is subject to a falling sickness. I never saw him in it.

Q. Have you occasion to know whether he is a person of entire understanding, or weak in his intellects?

A. I had occasion to give him orders in various things; and in any intercourse I had with him, we understood one another. He knew what was to be done or not.

Q. Did you observe any defect in his understanding? What kind of matters had you to speak of to him?

A. In cotton mills, there are many things of a mechanical nature to speak about.

Q. Did he appear to you to have the ordinary memory and understanding of other men?

A. I always received the same kind of answers from him as from any of the other servants.

PETER GIBSON sworn—Examined by Mr Drummond.

COURT.—Being adduced here as a witness, you can now suffer in no respect on account of any share you may have had in the proceedings in question, and you will tell all that you remember of them.

A. I shall not tell what I do not remember.

MR D.—Do you know this man?

A. I do.

Q. What is his name?

A. Andrew M'Kinley.

Q. Do you remember seeing him in Hugh Dickson's, in December last?

A. Yes.

Q. Do you remember what other persons were at that meeting?

A. There were so many of them, and some I did not know.

Q. Mention any of the names.

A. Hugh Dickson, John Campbell, John M'Lachlane, and I.

Q. About how many might there be altogether at the meeting?

A. I think there might be about ten.

Q. Was there any thing of the nature of an oath, obligation, or promise, at that meeting?

A. A promise of secrecy by shake of the hand. Do not be too fast with me. I should wish so.

Q. Can you describe to us how that promise of secrecy by shake of hand was done?

A. I cannot describe the very way. I remember we all shaked hands.

Q. Did you stand up?

A. Upon our feet. We had been sitting; and we shook hands, that what we should get we should keep to ourselves.

Q. All information?

A. All information whatsoever.

Q. Do you remember a meeting some time after this at William Leggat's?

A. In Tradestown?

Q. Yes.

A. I remember a meeting there.

Q. At what time?

A. I think on the 1st of January.

Q. Was M'Kinley at that meeting?

A. I think he was.

COURT.—Are you positive he was?

A. I am pretty sure he was there.

MR D. Can you mention any other names?

A. I cannot recollect any more than I mentioned before.

COURT.—Were there others?

A. Yes, strangers to me.

MR D.—Was there any thing in the shape of oath, promise, or obligation, at that meeting?

A. As I had got spirits before going there, and while there, I do not recollect what was said or done at the meeting of the first of January. I dare not say any thing concerning it. I am not very sure.

Q. Do you mean to say you were so drunk that you could not remember?

A. I do not mean to say that I was drunk. There are different degrees in which persons may be the worse of liquor. I have seen some persons who cannot go, others who cannot speak, and some who can do both, but do not afterwards recollect what happened in their presence.

Q. Do you know what M'Kinley and the others did?

A. I remember coming home with them. We went into a public house at the Calton, where I fell asleep and continued so, I was told, for two hours.

Q. Do you remember the approval of a bond or oath of union?

A. I do not remember.

Q. Do you swear you do not remember?

A. I swear.

Q. Do you say or swear you do not recollect any thing of an oath at that meeting?

A. I do not recollect any thing about it.

Q. Do you recollect any thing about a bond of union at that meeting?

A. I saw one about the 2d or 3d of January.

Q. Where?

A. In a man's hand in the Calton.

Q. Was there any thing of that kind at the meeting?

A. I don't recollect of it.

Q. Was there a person of the name of M'Dowall Pate at that meeting?

A. I was told he was.

LORD ADVOCATE.—After you did know him, did you recollect having seen him there?

A. I do not remember.

Q. Were you at a meeting at Neill Munn's, upon the 4th of January?

A. Yes.

Q. Were those persons present who had been at the former meetings? Was M'Kinley there?

A. I do not remember of seeing M'Kinley there. I was out some time. I do not recollect him.

Q. Was he there?

A. I say he was not there.

Q. Was Somerville there?

A. I do not recollect.

Q. Was Hood there?

A. Yes.

LORD JUSTICE CLERK.—He has said M'Kinley was not there, at least as far as he recollects.

LORD ADVOCATE.—We must ascertain how far his memory serves him, and whether he be consistent in his statements.

Q. Was Somerville there?

A. I wish to say nothing but what I recollect. I am not certain whether he was. I have a judge to answer at another day.

Q. Was Hood there?

A. Yes, I say he was. I have not at all a good memory.

Q. Hugh Dickson's house is off and on with your's?

A. A but and a ben—I am on the north end, and he is to the south of that in the middle.

Q. You have said you were at a meeting in Hugh Dickson's part of the house, in which John Campbell and M'Kinley were present?

A. I said so, and I say it yet.

Q. I believe your statement is perfectly true, and you said there was a promise of secrecy. Was any paper produced and laid before the meeting?

A. It might be the case, but I do not recollect.

Q. Do you recollect of any paper being read in the form of an obligation of any sort?

A. No.

Q. Any thing of the nature of a bond?

A. I never heard tell of a bond or any such thing.

Q. An oath?

A. No.

Q. A declaration?

A. No.

Q. Did you hear any words repeated, in which the name of the Almighty was employed?

A. No.

Q. Do you know Robertson's?

A. I know the place.

Q. Were you there on the 15th of February?

A. You are leaving a long way now. I was there.

Q. Was a person of the name of Finlayson there?

A. Yes, I think so.

Q. Was M'Kinley there?

A. Yes.

Q. I ask you upon your oath, whether an oath or obligation was administered to him there in presence of the pannel at the bar?

A. I could say, and hold up my hand again, that there was no such thing, or I am very far mistaken upon the 15th of February, in Robertson's.

Q. Was there so any other day?

A. I never saw that man administer an oath to Finlayson?

Lord Advocate. I wish the witness's deposition to be taken down in writing.

The following was taken down in writing by the Clerk of Court.

"And upon the motion of the Lord Advocate, the said Peter Gibson being interrogated, if at the meeting at Robertson's, on the 15th day of February last, at which he admits he was present, and where he depones the pannel and one Finlayson also were, any oath was administered by the pannel to the said Finlayson in his presence, depones, That there was none. Interrogated, if, upon the above occasion, any oath was administered to Finlayson by any other person in the presence of M'Kinley, the pannel? Depones, That there was no oath administered to Finlayson, or any person else at Robertson's, on the 15th of February last. Interrogated, if any oath was administered by M'Kinley, or any body else in M'Kinley's presence, either to Finlayson or any body else, on any other day in the month of February last, at Robertson's? Depones, That he was present at a meeting at Robertson's, on the 18th of February last, along with the pannel M'Kinley and Finlayson, when he thinks there was an obligation taken; but whether it was more than a promise,

or amounting to an oath, he does not recollect. Depones, That at the meeting at Leggat's, on the 1st of January last, which was the only one he ever was present at in that house, he was in liquor, and if he took any obligation or oath there, he does not know of it, nor does he know of any other body having taken any there. Depones, That he never read any oath from a paper, because he cannot read writing; and all which he depones to be truth, as he shall answer to God."

(Signed) PETER GIBSON.

Q. Who took the promise on the 18th of February?

A. All present.

Q. Was there any writing?

A. No.

Q. Was it read?

A. No.

Q. Was it repeated?

A. I am not very certain.

Q. What do you think?

A. I did not see those present take this obligation, and do not know whether it was any more than a promise.

Q. How was it taken?

A. I think it was repeated. I do not recollect who repeated it.

Q. Was it M'Kinley?

A. I do not recollect whether he or not.

Q. You have said there was something of the nature of a promise. What did they promise to do?

A. There was a secret committee chosen to do nothing unknown to the central meeting. They bound themselves to do nothing but what was to be made known to the central meeting.

LORD HERMAND.—Is that all you recollect?

A. That is all I recollect.

LORD ADVOCATE.—Did you at any time, at any meeting at Robertson's, at Hugh Dickson's, at Leggat's, in the months of January or February, see any other oath taken than that you have now mentioned, in presence of the pannel?

A. In Hugh Dickson's, there was a promise by shake of hand. On the first of January I do not remember what was said. And in Robertson's, on the 15th, there was no obligation at all.

Q. I ask, whether at any time of these two months, you heard any obligation taken?

A. I do not remember seeing more than what I have told you of.

Q. Did you take any yourself when M'Kinley was present?

A. No. Mind, I said I do not remember what passed on the 1st of January.

Q. When sober, at any time, did you take an oath, or any obligation when the prisoner was present?

A. No.

Q. In the month of December, was there any other promise?

A. No.

Q. In the house of Leggat, in December, was any other taken?

A. I never was there any other time. I can say no more.

Mr Drummond.—Had you any other symptom of intoxication, than want of recollection?

Lord Advocate.—I want to know, whether you administered an oath, or read any thing in the nature of an obligation, at any of the houses or times mentioned, or tried to read any?

A. I never read one in my life, nor tried, for I cannot, which is a very good reason.

Q. You limit your answer by saying, you did not see an oath administered, or did not read an oath? Did any person read it to you?

A. No person.

Q. Was any oath repeated then?

A. There was never an oath repeated than what I have told you, up in Dickson's, on the 18th of February.

The counsel for the pannel put no questions to this witness.

Jury.—In consequence of what took place on the 18th, or at any other time, do you conceive yourself under an obligation to conceal the truth? In consequence of that promise, or oath, whether more solemn or not than you describe it, do you hold yourself at all influenced?

A. Not in the least. I gave up all that this present month.

JAMES FINLAYSON sworn—Examined by Mr DRUMMOND.

Q. Do you remember being at a meeting, in February, at Robertson's, in the Gallowgate?
A. Yes.
Q. Were you at more than one?
A. I do not remember the dates. I was at two, at that man Robertson's.
Q. At what date was the first?
A. Upon a Saturday.
Q. What time of the year? The month of February?
A. I think it was February; a week before I was taken up.
Q. How many were present at that meeting?
A. At the first?
Q. Yes.
A. About twenty.
Q. Can you name any of them?
A. Yes, the prisoner was there.
Q. Do you remember the names of any of the rest?
A. Yes, Peter Gibson was there.
Q. Do you know him?
A. Yes. That was the first time I ever saw Gibson.
Q. Do you remember any others?
A. John Campbell was there.
Q. Was Hood there?
A. Yes.
Q. Was James Robertson there?
A. Yes. James is his name.
Q. Was Sommerville there?
A. Yes.
Q. What is his first name?
A. Andrew.
Q. Was Buchanan there?
A. Yes.
Q. What is his first name?
A. I think, John.
Q. Was there any preses of the meeting?
A. Robertson.
Q. What was done at this meeting?
A. They chose a select committee.
Q. What was that for
A. I do not know what it was for. Positively I do not know what it was for.

Q. Were you one of the committee chosen?

A. Yes.

Lord Advocate.—Do you remember whether there were any oaths administered?

A. Yes, I do.

Q. Recite them, and let us hear them, if you can?

A. I have heard two. There was none at the first meeting.

Mr Drummond.—Was any thing more done, that you remember?

A. I never heard what the select committee was to do.

Q. Was any thing more done at that meeting, by way of oaths?

A. Members brought money.

Q. What was done with the money?

A. It was given to the treasurer.

Q. Who was treasurer?

A. Hugh Cochrane. He was there.

Q. Those present brought money?

A. Some of them. I did not see all of them.

Q. Do you remember any thing more?

A. There was a good deal said, but I do not remember it all. The most of the time was taken up in electing that Committee.

Q. Was the prisoner at the next meeting, on a Tuesday?

A. Yes.

Q. Was any oath administered or taken at the next meeting?

A. Yes.

Q. What took place at that meeting?

A. An oath was dictated to me, and I wrote it.

Q. What was the nature of this oath?

A. I cannot repeat it. The whole matter of it—we were not to tell any body what was to be done; either the names of the select committee, or any thing they should do, for that select committee was not elected openly, but by ballot.

Q. Was Gibson present when that oath was administered or taken?

A. Yes.

Q. What was done with the oath?

A. I read it out.

Q. All of the rest repeated it after you?

A. They all stood round the table, and I heard their voices repeating it after me.

Q. You administered it to the rest?

A. I could not tell whether all did repeat after me.

Q. Did Gibson?

A. I do not know; one or two may not have followed me, and I may not have noticed it.

Q. Was Gibson present at the time?

A. Yes.

Q. Was he one of those standing round the table?

A. Yes.

LORD ADVOCATE.—Do you know if any other oath was taken there then, or in any other houses, in the month of January?

A. Not in that house.

Q. No other in that house?

A. No.

The Counsel for the Pannel objected to the questions now put, and the witness was withdrawn.

LORD ADVOCATE.—The indictment charges the oath to have been administered at a secret meeting held at the house of Wm. Robertson, innkeeper and stabler in Gallowgate of Glasgow, or elsewhere at Glasgow, or in the immediate vicinity thereof. The question I wish to put, is, whether or no, at any other place in Glasgow, within the three months, the witness heard any oath administered, at which the pannel was present?

MR JEFFREY.—We must object to that question. If there be any use at all in the specification, without which the relevancy of the libel could not be sustained, it must be incompetent for the prosecutor, after the opportunity he has had for deliberation upon this indictment, to put such general questions to the witness. In this case, particularly, where there is a specification of only one meeting, at which this witness is stated to have been present, (for he is not mentioned to have been present at Hunter's, or Leggat's, or at any other meeting,) such a general question cannot be allowed. You have that meeting specified in the indictment: and I submit, that, especially after the prosecutor has brought out that an oath was administered, (but which is not very available to him), he cannot take an opportunity of putting a general question to the witness, whether an oath was administered in Glasgow, or the

vicinity, at any time within the limitation of these months (for, as to Robertson's, the prosecutor has not confined himself there).

This indictment is divided into five heads, charging, as so many acts, the administration of the oath, at fixed dates and places, to a number of persons mentioned; and the advantage of specification would be lost, if a practice were to be introduced, that after naming a day and place in his charge, the prosecutor might, in his examination, go through many months and different places. The general expressions added in an indictment are intended for any casual slip or inaccuracy in what must be articulately stated, and not to give the prosecutor such a range of inquiry as he now wishes. To what is particularly charged and specified alone he must confine himself. Were it to be otherwise, we might be mocked with the appearance of a form of specification in an indictment, but we should be deprived of any benefit from it; and we might be condemned, in other hands, to suffer the perversion of all the forms considered indispensable to the safety of the subject. If this were to be permitted, any suspected places might be mentioned; and different places might be intentionally put in to oppress prisoners, by the most intolerable latitude of investigation. I submit, therefore, that the question proposed by the Lord Advocate cannot be put to the witness.

Mr Grant.—In a case in which I attended before you last year, where a carrier was tried for theft, the description of some of the stolen goods was in general words, "cotton twist, and other goods;" and you were all clearly of opinion, that the description was not sufficiently particular and specific.

Lord Advocate.—My learned friends are mistaken in supposing that the general description given in the indictment applies merely to the persons to whom the oath was administered. It applies also to the places; and your Lordships have found it, by your interlocutor of relevancy, to be sufficiently specific. The question is, therefore, whether or not your Lordships, having found this part of the indictment relevant, the prosecutor is to be narrowed, in the course of his investigation of the facts so found to be relevantly set forth, by the objection in question.

The dates when the oath is alleged to have been admi-

sistered are given specifically in the indictment, as well as generally, within two months. Your Lordships have already allowed questions to be put as to meetings any day in the months of January or February, without adhering merely to the precise days in the minute and specific statement of the previous clause of the indictment. Yet it is obvious, that the same objection now stated to putting a question as to meetings in other places than those specially mentioned, but referring to meetings at Glasgow or the vicinity thereof, as stated in the indictment, might have been urged with the same propriety to a question general as to the time, and not referring generally to the dates condescended on. Now, what I now wish to prove relates to a meeting at some place in Glasgow or its vicinity. Your Lordships have found, that the charge in the indictment laid in those terms, and thus generally, is relevant; and you have actually allowed me to put questions equally general as the present, with respect to time. The same principle, I submit, ought to prevent my being narrowed in my enquiries as to place. This, as I understand it, is the simple statement of the case, and, I submit, your Lordships would not have remitted the indictment to an assize without erasing that general statement from the indictment, if Mr Jeffrey's present objection appeared to you to have been well-founded.

Lord Justice-Clerk.—We certainly could not repel this objection without the most deliberate consideration. I took it for granted, there were four several occasions upon which, it is alleged, the oath was administered; and, although the general words in the indictment, founded upon by the Lord Advocate, did not, among the multiplicity of points for consideration, strike me before, now that the objection to them is pointed out, I have to state, that I think it is my duty to confine this examination to the specific charges in the indictment.

Lord Hermand.—I was a little misled at first, particularly as to the first charge. It says, "At a secret meeting, held at the house of Hugh Dickson, then weaver in Abercromby-street, in Calton of Glasgow, or elsewhere at Glasgow, or in the immediate vicinity thereof, you, the said Andrew M'Kinley, did," &c. But, upon looking at it again, and comparing it with the statement of the next charge, it appears only a broad description of the

habitation of the man. The words apply to a description of the residence of Dickson, as the next to a description of that of Leggat. The Lord Advocate questioned as to what happened at Robertson's. Under this indictment, he is entitled thus generally to establish the facts which have been found relevant.

Lords Gillies, Pitmilly, and Reston, intimated their agreement in opinion with the Lord Justice-Clerk.

(The witness was recalled.)

Lord Advocate.—Q. Do you know Hugh Dickson?
A. Yes, I think so.
Q. Do you know he has a house in Glasgow?
A. No; I do not know that.
Q. You never was in his house?
A. No.
Q. In the house of William Leggat?
A. Not to my knowledge.
Q. Do you know Neill Munn?
A. I have seen his sign, but was never in his house.
Q. And, in none of the three months mentioned, you ever heard, in Robertson's house, any other oath?
A. There was never any other oath in that house, either on the Saturday or Tuesday.
Court.—Q. In that house, upon any other day in that month, were you present when an oath was administered?
A. Yes; but I do not remember the day.
Q. In that month of February?
A. I think it was.

Mr Jeffrey.—This does not seem applicable to the particular charge against the pannel.

Lord Advocate.—There is no necessity for proving that M'Kinley was present, in order to bring the charge home to him. He might be an accessary, though he was absent; and this is charged against him in the indictment. The witness says, there was an oath administered in Robertson's at a particular period; and I presume we are entitled to have this fact investigated, as we may be able to prove the pannel's connection with the administration of this oath, and to establish against him the charge in the indictment. Perhaps I may not have fully comprehended the force or extent of my friend Mr Jeffrey's ob-

jection; and before my friend the Solicitor-General or myself submit any observations upon it, I hope he will state it more fully. I have given what appears to me a sufficient answer to the objection, as already brought forward.

(The witness was withdrawn.)

Mr Jeffrey.—My objection is two-fold. In the case of accession to crimes committed, the first thing to be proved is the crime. This is a different case. The charge is, that the pannel at the bar was guilty of administering the oath specified in the indictment. It is true, by the other clause of the act of Parliament, it is said, "That persons aiding and assisting at the administering of any such oath or engagement, as *aforesaid*, and persons causing any such oath or engagement to be administered, though not present at the administering thereof, shall be deemed principal offenders, and tried as such; and, on conviction thereof by due course of law, shall be adjudged guilty of felony, and shall suffer death as felons, without benefit of clergy, although the person or persons who actually administered such oath or engagement shall not have been tried or convicted." But it is necessary, that the fact to which this clause may apply should be specifically stated in the indictment, to give the benefit to the Lord Advocate of that special clause. Now, there is no specific allegation in any one of these charges, that the pannel had *caused* the oath alleged to be administered.

Mr Drummond.—That is clearly charged.

Mr Clerk.—It is charged: You did so and so, or did so and so. If there is an allegation that he did cause the oath to be administered, what is it alleged that he particularly did at that house, and upon that occasion?

Lord Hermand.—That he administered the oath, or caused it to be administered, is libelled. But the whole act of Parliament is libelled on; and the fourth clause is, (Here his Lordship read the clause above quoted by Mr Jeffrey.)

Lord Justice Clerk.—There is no doubt of it—look to the words of the Act of Parliament. The very words are repeated in this charge as to Robertson's.

Mr Clerk.—But then it is not said in that charge, that when he caused the oath to be administered he was at any other place. Now, please attend. It may be true, that it is very well to allege the pannel caused the oath to be administered; but then it is necessary to allege where? And the allegation in the libel is, that at that place he caused the oath charged to be administered, else no place whatever is assigned.

Lord Hermand.—The allegation is, that the oath was administered in that house. "Further, you the said Andrew M'Kinley did, upon the 5th day of February, 1817, or on one or other of the days of that month, or of January immediately preceding, at a secret meeting held at the house of John Robertson, then innkeeper and stabler in Gallowgate of Glasgow, or elsewhere at Glasgow, or in the immediate vicinity thereof, wickedly, maliciously, and feloniously administer, or cause to be administered, or did aid and assist at the administering an oath or engagement." He may have caused the administering of the oath in that house, though he never entered it in his life.

Mr Clerk.—I have one remark to make on the clause in the Act of Parliament. "And persons causing any such oath or engagement to be administered, though not present at the administering thereof, shall be deemed principal offenders, and shall be tried as such." It is not libelled that the pannel caused the oath to be administered, though he was not present. On the contrary, it is alleged he was present, and so caused the administering of the oath in that place. Neither time nor place is assigned for the commission of the crime, unless this time and this place are assigned.

Solicitor-General.—I am little disposed to trouble you, by prolonging this debate; but, with your Lordships' permission, I beg to address a few words to you. It is necessary that the precise nature of the objection now made, should be recalled to mind, before the answer to it can be understood. The proper form of the objection seems to be this: Is the public prosecutor entitled to prove the import of the oath, before proving the presence of the pannel at the administration of it? The Lord Advocate asks of the witness what is the import of the oath which was taken or administered by the witness, or in the presence

of the witness, and the objection is, he is not entitled to put this question, till the presence of the pannel on that occasion be proved. I submit, that this is no objection at all, because it is competent for the public prosecutor to prove, by one set of witnesses, that the oath was administered at the time spoken to; and it is competent for him to prove, by other witnesses, that the pannel was present. I know of no rule, in the law of evidence, which requires that the nature of the oath, and the presence of the pannel, should be established at the same moment, or by the same witnesses. Much light has already been lost by the real or pretended failure of memory in witnesses. If the rule which the other side of the bar contend for were adopted, it would produce much inconvenience, and a total impossibility of proving a crime in any instance. In every criminal charge, the public prosecutor may prove the *corpus delicti*, before proving the connection of the pannel with it; and he neither can be, nor ought to be controuled in the course and order of adducing the proof and conducting the case. In this part of his duty, he acts upon information, of which the Court and the prisoner neither can nor ought to be in possession. The objection by the pannel rests on a principle leading directly to absurdity, and creating impracticability in business.

Mr Jeffrey. I submit that this position is untenable. The Solicitor-General says, it is competent to prove the administration of the oath and its tenor, by one set of witnesses, and then by another set, to prove that the pannel was present at or connected with the administration of the oath. If he has witnesses to prove that the pannel was present, should not he first prove that? Upon what principle can he be allowed to prove any thing about an oath, without proving the pannel's connection with that oath? If the fact, as to an oath having been administered, be proved, without the prisoner's connection with it, would any thing be established against the prisoner? To prove the administration of an oath, or the terms of any oath, can here be of no avail, unless my client's connection with it be established. Without this, there is no evidence against the prisoner. A case might happen, that goods were carried off by one man, and found in the custody of another, and to such a case the principle of the Solicitor-General might apply. But such a case is of a different kind from the present;—and if it is hinted that, perhaps, you will get nothing from Mr Finlayson but the statement of an oath, and nothing about

the prisoner,—how could you afterwards get any thing to connect the prisoner and the oath? At any rate, what disadvantage does the public prosecutor suffer, by being called upon first to prove the presence of the pannel? while I have a material interest that the minds of the jury should not be prejudiced by any proof as to an oath extraneous to the case of the prisoner. Are they entitled to proceed so as to induce an impression against the prisoner of the most unfavourable nature, when, if they had begun at the end, to which they must go, and enquired as to the relation of the prisoner with the facts, they could have found no proof of any guilt attachable to him?

Lord Gillies.—This is a question of importance and difficulty. One objection has been stated, and two different answers have been made, and have given rise to two questions. The answer made by the Lord Advocate is, that the act of parliament entitles him, although M'Kinley may not have been present when the oath was administered, to prove that he caused its being administered. The Solicitor-General again says, I may prove by another witness that the oath was administered by the agency of the pannel. We are bound to consider both questions.

The Lord Advocate says, he is entitled to prove that the pannel caused the oath to be administered, although he was not present when it was administered. That is the first and most important question. I think the Lord Advocate is not entitled to prove under this indictment that the pannel was not present at the administering, but caused the administering of the oath here charged. You must have the time when—the place where—(though there may be some latitude as to both)—You must have the *species facti*, the *quo modo*, set forth. The fact of causing, when absent, is different from causing when present. The fact that the pannel caused the oath to be administered in his absence, is not set forth in the indictment; and I must appeal to my own recollection, and to that of every one who hears me, whether it entered into your contemplation that the Lord Advocate meant to charge the causing without the pannel's being present at the administering. I am not talking of the major proposition—but, what I find defective, is, that this *species facti*, now stated by the prosecutor, is set forth in no part of the minor proposition, and I was led to conclude, that all that the Lord Advocate meant to prove was, the administering of the oath, the pannel being present at the time. If he meant to prove a spe-

cies facti of a different kind, that the pannel, though not present, caused the administering, that *species facti* should have been stated. And surely, according to Mr Hume's doctrine of specification, the fact whether the pannel was present or not at the administering of the oath should have been stated. Then, is the Lord Advocate entitled to bring an indictment without saying whether the pannel was present at the administering, or a hundred miles off? His Lordship's plea is competent, under the major, but not under the minor proposition. If you adopted this view of the Lord Advocate's, you would proceed on a *species facti*, taking for granted it is not necessary to state the *quo modo* of the *species facti* alleged to be committed.

As to the question raised by the Solicitor-General's answer, it is of a different nature; and I do not know by what principle of law the public prosecutor can be hindered from proving the fact, and then the presence of the pannel. But, I submit to the public prosecutor, that it is an inconvenient mode of proof. I do not mean to sustain the objection upon this ground; but, it can answer no purpose to prove, that any obligation was then administered or taken; for it cannot, and ought not to affect the prisoner if he was not present. And the only effect would be to create a prejudice in the minds of the Jury.

Lord Pitmilly.—My difficulty arises from what has been stated by the Solicitor-General. The crime charged is, that the pannel administered the oath, or caused it to be administered. It will be sufficient to prove that he administered the oath, or caused it to be administered—but then we must attend to the manner in which, the time when, the place where, he had done so, and I agree as to what has been said by Lord Gillies and Mr Clerk, that such particulars require to be specified. It is said in the indictment, that the pannel did, "upon the 5th day of February, 1817, or on one or other of the days of that month, or of January immediately preceding, at a secret meeting held at the house of John Robertson," &c. Whether he administered the oath, or caused it to be administered, it must be upon the 5th of February, or some day of that month, and at that secret meeting. It will not do, that he did it out of that meeting. I think we are bound strictly to fasten the prosecutor down, both to the time and place charged in the indictment. The proof must be as to February or January, and the pannel must have been present.

I have some difficulty, from what the Solicitor-General stated; for, it is possible this man may have caused that oath to be administered, and perhaps in a room among a crowd, and a particular witness may not have known the pannel had been the cause of the administering. I think it is not incompetent to the public prosecutor to prove as he was doing. If he fail, it will not go against the prisoner.

Lord Reston signified his agreement with what had been said.

Lord Justice-Clerk.—I agree, that though it is competent to charge the causing the oath to be administered, as well as the administering of the oath, yet the same precision is required as to the *species facti* charged, and that time, place, and manner, should be particularly specified. But I own I am equally clear, that there is nothing that can prevent the public prosecutor from proving the nature of the oath, and the place and time when it was administered, and afterwards the pannel's presence. I am, therefore, for allowing the question to be put.

(The Witness was brought back.)

Lord Advocate.—What were the terms of the oath put that other night at Robertson's, not the oath of secrecy?

A. It was the prisoner who administered that oath.

Q. What were the words?

A. It was the usual one. I cannot repeat it. It was about reform.

Q. Do you remember how it began?

A. "In the awful presence of God."

Q. Was there any thing about swearing?

A. Yes.

Q. What were the words?

A. I saw an oath, after I was put in prison, in a speech in parliament which was the same as that then administered.

Q. You said the oath began, "In the awful presence of God." Was there any thing about the word "swear?"

A. If I had not seen the oath in a newspaper, I could not have remembered a word of it.

Mr Clerk made some observation which the Reporter did not hear.

Lord Advocate.—I cannot lose the benefit of this witness's testimony, and I have no wish to put any ques-

tions but with a view to get the truth from him of what he may know actually to have taken place. I should be happy to prevent those interruptions from the other side of the bar if your Lordships would take the examination of this witness into your own hands.

Mr Grant.—We can have no farther questions to put after his last answer.

Lord Justice-Clerk.—Till you saw the oath in a newspaper, you could not have repeated any part of it?

A. Nothing but the beginning. Before I went out, you asked me whether there was an administration of any other oath in these houses. I recollect, after I read out the oath in Robertson's, John Buchanan came in and I read it to him—the secret committee oath.

Lord Hermand.—Could you, without the newspaper, have recollected the latter part of the oath?

A. No.

(Witness withdrawn.)

Lord Advocate.—Although the witness read the oath in a newspaper, he did not swear the reading in the newspaper gave him any new impressions of it. The circumstance merely brought it to his recollection. He has expressly said the oath he then read was the same he heard administered in the meeting. Now, I beg leave to ask, what is there to prevent my laying a copy of the oath even now before him, and asking the witness whether that was the oath which was administered or no? I am not aware of any rule of law which should prevent my doing so, and it would in many cases be attended with the total loss of evidence if such a form of proceeding was held to be illegal. Few persons have the power of repeating from memory *verbatim* what they have read, although they can recollect it when laid before them, or read over to them; and it would be to render the statute under which this indictment is laid utterly inoperative, if it were held that it is incompetent to do more than ask the witnesses to repeat the *ipsissima verba* of the illegal oath charged to have been administered. Nothing, in effect, more happened in this case. Indeed, I apprehend not so much has been done, when the fact is merely that the witness saw accidentally in a newspaper the oath which he had heard before, and which brought, he depones, its terms to his recollection. In fact, the question is not how he came to remember the oath, but does he now recollect it; and, I submit, it is of no consequence how that recollection was obtained, (ex-

cepting always any undue proceeding on the part of the public prosecutor, which is not here alleged to have taken place,) if it is clear and distinct.

This is a question of great importance indeed; and if your Lordships sustain this objection, founded upon the witness having read the oath in a newspaper, it will go far to impede the course of justice. The same must in every case be sustained where the witness has read the narrative of the previous proceedings before a magistrate, in the public prints, and an end would therefore be put to convictions in the most atrocious cases, which are generally those on which the most public investigations take place.

Mr Jeffrey.—Nothing can be more fair or candid than the statement of the Lord Advocate, and I agree with him in an observation which he made, but it leads to a decision in my favour. If the Lord Advocate had been correct in stating, that, in consequence of an innocent accident, the crown was to be deprived of any thing they would otherwise have had the benefit of, that certainly would be an evil. But observe how the fact stands. The witness admits, that, in point of fact, if the trial had proceeded before he read the newspaper, or if he had never seen it, his memory would have been an entire blank as to the terms of the oath; and the question is, Can evidence from such a source be received in a court of justice?

What is it that a witness must speak to? The facts to which he was present; and if he states, that, as to these facts, he has no recollection of himself, and that the source from which he has derived any recollection of the circumstances, is a newspaper, this is no evidence at all.

I distinguish this case from one where a person may say, I had forgotten every thing but for a paper that I wrote myself, and, immediately upon reading it, my memory was refreshed, and I could now positively swear to the circumstances. But only see the difference here, and see the infinite incalculable danger to which a person might be exposed, particularly in a question with the crown, as in the case of the pannel here, on a trial upon charges of a crime against the government, if a witness were to be examined whose memory is gone, and who is totally unable to give testimony on the subject but from the accident of seeing an unauthentic account in a newspaper. Such witnesses will be liable to the delusions to which the human mind is liable, from any thing bearing a resemblance to former objects of its knowledge, and will think that they have seen before

what only bears a resemblance to what they had formerly known. Every one familiar with dreams must know, that in them the vividness of conception sometimes leaves an impression almost of reality on the mind. A witness, who has altogether forgotten the terms of an oath which he had once read, and afterwards reads in a newspaper an oath which appears of the same general description, will believe it to be the same oath; but if he be examined on the subject, all he can swear to will be the tenor and recollection of what he read in the newspaper. Even at this moment the witness swears he could not have recollected any thing of the nature or terms of the oath but for the newspaper. A witness whose memory is revived by accident, may say, I now remember. But this witness says he could not have recollected but for the newspaper. *He recalls the oath to his imagination rather than his memory. If he says he has no recollection* but *from* the newspaper, he has no recollection but *of* the newspaper, a source of information which must exclude his evidence from being received. I submit, that, in a court of civil jurisdiction, evidence of this kind could not be received; and to allow evidence of this questionable sort to be taken in this Court, and in such a case as the present, would be an example of the most dangerous nature.

Lord Advocate.—If the recollection of the witness depends altogether upon what he read in the newspaper, I am not entitled to ask as to that recollection; but my question is, whether he can recollect the substance, not the terms of it, without the newspaper? I wish that farther cleared up.

Lord Justice-Clerk.—I think it right to state what I have taken down from the witness.—"That if he had not seen it in the newspapers he would not have remembered another word of it; and that, with the exception of the words in the beginning he has stated, he could not have repeated on his oath any part of it, had he not so seen it in the newspapers." Under these circumstances, we are clear it would not be consistent with any rules of justice to have the witness examined further as to the terms of that oath, for he could only give his recollection from the newspaper.

Lord Hermand.—In answer to my question, he said he could not without the newspaper have recollected the last

part of the oath; so he cannot be examined further on the terms of the oath.

WITNESS BROUGHT BACK.

Q. By whom was this oath administered at Robertson's?
A. By the prisoner.

Mr Jeffrey.—Q. To whom was it administered?
A. To a man whom we met upon the road.
Q. What other persons were present?
A. We went in with John Buchanan and this man, and John Buchanan went out to see another man, and then came in; and I am not sure whether the administering was done when he returned.
Q. No other person?
A. No.
Q. You do not know his name?
A. No.

Hugh Dickson, Sworn—Examined by the Lord Advocate.

Q. Do you know the house of William Leggat?
A. Yes, I have been in the house,
Q. Who were all there?
A. A number of men.
Q. Was the prisoner there?
A. Yes.
Q. Was Peter Gibson there?
A. Yes.
Q. Was M'Lachlane there?
A. Yes.
Q. Was John Campbell there?
A. Yes.
Q. Was any oath taken or administered at that meeting?
A. There was what we called a bond of union agreed among us at that meeting.
Q. Can you repeat it?
A. No.
Q. Can you tell the import of it?
A. Hearing it read, I could give an idea if it was like it. I never read the original.
Q. Did you hear it read that night?
A. Yes.

Q. Who read it?
A. I could not be certain of his name who read it.
Q. Was it the prisoner?
A. No.
Q. Was he present when it was read?
A. I think he was.
Q. Did you take it? Was it given to you? Was it administered to you?
A. After it was agreed upon, it was taken by a vote. From circumstances that occurred through the day, I could not say it was taken as an oath. It might be the case.
Q In what form was it taken?
A. They stood up and held up their hands. I do not remember any words used at the time.
Q. Part of the time it was read, they held up their hands?
A. Yes.
Q. What were the circumstances that happened through the day?
A. Being the first of January, I had got some liquor through the day.
Q. Did it affect your memory?
A. I could not take upon me to speak with certainty as to that night.
Q. Were you at Munn's?
A. On the 4th of January.
Q. Was the prisoner there?
A. Yes.
Q. Was the bond or oath read or administered there?
A. One man read it and held up his hand.
Q. Who was he?
A. I never saw him before or since.
Q. Was the prisoner present?
A. I do not know.
Q. Who read it?
A. The man himself.
Q. And held his hand up?
A. Yes.
Q. Was the prisoner present?
A. I could not say. The room was too small, and some withdrew. He had been at the meeting, but I cannot tell whether he was present at the administering.

Lord Advocate.—Withdraw the witness.

Lord Advocate.—Having now concluded the most ma-

terial part of the evidence upon which I had expected to establish the charges laid in the indictment, and finding that the witnesses have not given testimony corresponding to their previous examinations, and on which I was most thoroughly persuaded I should have convicted the pannel, I deem it incumbent on me, in justice to your Lordships, whose time is too precious to be needlessly wasted, not to take up a moment longer than necessary, by going into farther evidence, which I believe to be still less conclusive, and without proceeding farther in which, I am now satisfied the pannel is entitled to a verdict of acquittal. However much, therefore, I must regret a result so different from what the truth of the case and public justice demanded, my consolation will be that I have discharged my own duty in submitting the investigation to the judgment of a jury.

Mr Jeffrey.—After what has been stated, with so much candour and propriety, by his majesty's advocate, I should be to blame, if I were to dwell on the course of evidence which has been led. I should be infinitely to blame, if even any feeling of joy or triumph, excusable on such an occasion, should lead me to make any farther observations. I shall be satisfied with that verdict which the good sense and right feeling of the jury shall determine upon; and, in whatever terms that verdict shall be contained, I am sure it will do ample justice to the whole case.

Lord Justice-Clerk.—Gentlemen of the Jury, I am happy to think, that, after what has taken place, the pannel can expect nothing but an acquittal. Your duty is now an extremely light and pleasant one, and very different from that which must have been expected when we commenced this trial. It is your duty to return such a verdict as you may think due to the case, taking all the circumstances into consideration, and to find the pannel either Not Guilty, or the libel Not Proven. I leave the case in your hands, you being possessed of all the facts as hitherto disclosed, and quite able to discriminate the circumstances of the evidence. And as to the verdict you return, it may be *viva voce*, if you are unanimous; but, if not, we will sit with great pleasure to receive your verdict in writing, if you think it necessary to retire for that purpose.

The Jury, without retiring, unanimously found the Libel Not Proven.

Lord Justice-Clerk.—Gentlemen of the Jury, you are now discharged from your fatiguing duty; and I have to express my entire concurrence in the terms in which you have expressed your verdict.

Andrew M'Kinley,—in consequence of what has passed this day, relative to the charge exhibited against you, the Jury have returned a verdict, all in one voice, finding the libel Not Proven. It is therefore the duty of the Court to assoilzie you *simpliciter*, and to dismiss you from that bar. But, Sir, I cannot help noticing, upon this occasion, that the verdict of your countrymen has not pronounced you to be Not Guilty of the charge that was exhibited against you; and I have already stated in your presence, that, in reference to the evidence, unsatisfactory and inconclusive as it was with respect to the full measure of your guilt, and looking, above all, to those declarations of yours, which were proved and made part of the evidence by a regular minute of admission by your counsel, I am decidedly of opinion the Jury were bound to return the verdict now upon record—a verdict which leaves a mark upon your character, that nothing but a life of future rectitude in every respect can wipe off. You are now to be delivered from all risk of punishment for any degree of guilt you may have incurred relative to the transactions mentioned in the indictment; and I do hope and trust, that, after the full, fair, and impartial trial you have undergone, in which, while an attempt was made to establish the charge against you, you had the protection of the laws of your country, and the blessed safeguard of a jury of your countrymen to watch over your interests, you have now an entire and perfect conviction of the happiness and security under which the people of this country at present live, that you are now fully convinced the constitution of your country affords a complete safeguard to its subjects; and that there can be no risk of their lives or liberties being invaded, while the sanction of the law at all times extends its protection to them. I hope, therefore, when you return to the society in which you formerly lived, that, in whatever proceedings you may have formerly been engaged—whatever secret meetings you may have attended—whatever description of persons you may have been linked with by bonds of union, oaths, or engagements, you will from this time resolve to abstain from all such proceedings, and never render it even possible that any such charge should again be exhibited against you; that, on the

contrary, you will use your utmost endeavours, by holding out the example of the protection of the law, which you have experienced, to convince them that they ought to unite with you in preserving unimpaired that happy constitution and government, under which the subjects of this country live;—that, in short, you will act the part of a good subject, justify the verdict in your favour, and prove, that, though you may have been misled by the designs perhaps of other men, you are not wicked in heart, and will live peaceably in time to come. I trust what I have now said will have a due effect, and I congratulate you upon the verdict you have received.

"The Lord Justice-Clerk and Lords Commissioners of Justiciary, in respect of the foregoing verdict, assoilzie the pannel *simpliciter*, and dismiss him from the bar.

(Signed) "D. Boyle, J. P. D."

Andrew M'Kinley.—I am not able to stand, from a weak state of body, to return my thanks in a long speech. But I wish to return my sincere thanks to your Lordships for showing me such kindness;—to the gentlemen of the jury for their attention, and the verdict they have returned;—and to the Lord Advocate for his kind attention during my imprisonment;—and I wish publicly to declare, that I had all the liberty and indulgence that man could possibly have in such circumstances. My feelings of gratitude to my Counsel are stronger than I can express.

APPENDIX.—No. I.

PROCEEDINGS AGAINST JAMES M'EWAN, AND OTHERS, AT GLASGOW.

Extract from the Record, containing Proceedings in the Circuit Court of Justiciary at Glasgow, against James M'Ewan, M'Dowal Pate, or Peat, and John Connelton, 23d April, 1817, before Lords Hermand and Gillies.

"The diet was then called of the criminal prosecution at the instance of his Majesty's Advocate, for his Majesty's interest, against James M'Ewan, now or lately carding-master at Humphrie's Mill, Gorbals of Glasgow; M'Dowal Pate, or Peat, now or lately weaver in Picadilly Street, Anderston, in the vicinity of Glasgow; and John Connelton, now or lately cotton-spinner, in Calton of Glasgow, for the crime of administering unlawful oaths, as particularly mentioned in the indictment raised and pursued against them thereanent, bearing:—

James M'Ewan, now or lately carding-master at Humphrie's Mill, Gorbals of Glasgow; M'Dowal Pate, or Peat, now or lately weaver in Piccadilly Street, Anderston, in the vicinity of Glasgow; and John Connelton, now or lately cotton-spinner in Calton of Glasgow; You are indicted and accused, at the instance of Alexander Maconochie of Meadowbank, his Majesty's Advocate, for his majesty's interest: That albeit by an act passed in the fifty-second year of his present Majesty's reign, intituled, "An act to render more effectual an act passed in the "thirty-seventh year of his present majesty, for prevent-"ing the administering or taking unlawful oaths," it is *inter alia* enacted, "That every person who shall, in any "manner or form whatsoever, administer, or cause to be "administered, or be aiding or assisting at the administer-"ing of any oath or engagement, purporting or intending

" to bind the person taking the same to commit any " treason, or murder, or any felony, punishable by law " with death, shall, on conviction thereof by due course of " law, be adjudged guilty of felony, and suffer death as a " felon, without benefit of clergy." And further, by section fourth of said act, it is enacted, " That persons aiding " and assisting at the administering of any such oath or " engagement as aforesaid, and persons causing any such " oath or engagement to be administered, though not " present at the administering thereof, shall be deemed " principal offenders, and shall be tried as such, and on " conviction thereof by due course of law, shall be ad " judged guilty of felony, and shall suffer death as felons, " without benefit of clergy, although the person or persons " who actually administered such oath or engagement, if " any such there shall be, shall not have been tried or " convicted." And further, by section sixth of the said act, it is enacted, " That any engagement or obligation " whatsoever, in the nature of an oath, purporting or in- " tending to bind the person taking the same to commit " any treason, or murder, or any felony, punishable by law " with death, shall be deemed an oath within the intent " and meaning of this act; and in whatever form or man- " ner the same shall be administered or taken, and whether " the same shall be actually administered by any person " or persons to any other person or persons, or taken by " any other person or persons without any administration " thereof by any other person or persons." Yet true it is and of verity, that you, the said James M'Ewan, M'Dowal Pate, or Peat, and John Connelton, are all and each, or one or other of you, guilty of the said crimes, or of one or more of them, actors or actor, or art and part; in so far as you, the said James M'Ewan, M'Dowal Pate, or Peat, and John Connelton, having at Glasgow, and in the vicinity thereof, in the course of the months of November and December, one thousand eight hundred and sixteen, and of January and February one thousand eight hundred and seventeen, wickedly, maliciously, and traitorously conspired and agreed, with other evil-disposed persons, to break and disturb the public peace, to change, subvert, and overthrow the government, and to excite, move, and raise insurrection and rebellion; and especially to hold and attend secret meetings for the purpose of obtaining annual parliaments and universal suffrage by unlawful and violent means, did then and there, all and each, or one or other of you, wickedly, maliciously, and traitorously admi-

nister, or cause to be administered, or did aid or assist at the administering, to a great number of persons, an oath or engagement, or an obligation in the nature of an oath, in the following terms, or to the following purport:—"In "awful presence of God, I, A. B. do voluntarily swear "that I will persevere in my endeavouring to form a "brotherhood of affection amongst Britons of every de- "scription who are considered worthy of confidence, and "that I will persevere in my endeavours to obtain for all the "people in Great Britain and Ireland not disqualified by "crimes or insanity, the elective franchise at the age of twen- "ty-one, with free and equal representation and annual par- "liaments; and that I will support the same to the utmost of "my power, either by moral or physical strength, as the case "may require. And I do further swear, that neither hopes, "fears, rewards, or punishments, shall induce me to in- "form on or give evidence against any member or mem- "bers, collectively or individually, for any act or expres- "sion done or made in or out in this or similar societies, "under the punishment of death, to be inflicted on me "by any member or members of such societies. So help "me God, and keep me stedfast." Which oath or obli- gation did thus purport or intend to bind the persons ta- king the same to commit treason, by effecting by physical force the subversion of the established government, laws, and constitution of this kingdom. And more particularly you, the said James M'Ewan, M'Dowal Pate, or Peat, and John Connelton, did, upon the first day of January one thousand eight hundred and seventeen, or on one or other of the days of that month, or of December immediately preceding, or of February immediately following, at a secret meeting, held for that and other unlawful purposes, in the house of William Leggat, change-keeper in King-street, Tradestown, in the vicinity of Glasgow, or elsewhere at Glasgow, or in the immediate vicinity thereof, all and each, or one or other of you, wickedly, maliciously, and traitorously administer, or cause to be administered, or did aid or assist at the administering of an oath or obligation in the terms above set forth, or to the same purport, to Peter Gibson, John M'Lachlane, John Campbell, and Hugh Dickson, all present prisoners in the Castle of Edinburgh, or to one or other of them, and to other persons, whose names are to the prosecutor unknown; the said oath or obligation thus binding or purporting to bind the persons taking the same to commit treason, as said is. And further, (2) you, the

said James M'Ewan, M'Dowal Pate, or Peat, and John Connelton, did, upon the fourth day of January one thousand eight hundred and seventeen, or on one or other of the days of that month, or of December immediately preceding, or of February immediately following, at the house of Neil Munn, innkeeper and stabler in Ingram-street of Glasgow, or elsewhere at Glasgow, or in the immediate vicinity thereof, all and each, or one or other of you, wickedly, maliciously, and traitorously administer, or cause to be administered, or did aid or assist at the administering an oath or obligation in the terms above set forth, or to the same purport, to the said Peter Gibson, John M'Lachlane, John Campbell, and Hugh Dickson; also to James Hood, Andrew Sommerville, John Buchanan, and James Robertson, all present prisoners in the Tolbooth of Glasgow, or to one or other of them, and to other persons, whose names are to the prosecutor unknown; the said oath or obligation, thus binding, or purporting to bind, the persons taking the same to commit treason, as said is: And you, the said James M'Ewan, M'Dowal Pate, or Peat, and John Connelton, conscious of your guilt in the premises, have absconded and fled from justice. At least times and places foresaid, the said oath or engagement, or an oath or engagement to the same purport, was wickedly, and maliciously, and traitorously administered, or caused to be administered; and some persons did aid or assist at the administering thereof: And you, the said James M'Ewan, M'Dowal Pate, or Peat, and John Connelton, are all and each, or one or other of you, guilty thereof, actors, or actor, or art and part. All which, or part thereof, being found proven by the verdict of an assize before *the Lord* Justice-General, the Lord Justice-Clerk, *and* Lords Commissioners of Justiciary, in a Circuit Court of Justiciary, to be holden by them, or any one or more of their number, within the burgh of Glasgow, in the month of April, in this present year one thousand eight hundred and seventeen, you the said James M'Ewan, M'Dowal Pate, or Peat, and John Connelton, ought to be punished with the pains of law, to deter others from committing the like crimes in all time coming.

(Signed) H. Home Drummond, A. D.

And the said James M'Ewan, M'Dowal Pate, or Peat, and John Connelton, having been all and each of them oftentimes called in open Court, and three times at the door of the Court-house, yet failed to appear.

The Lords HERMAND and GILLIES decern and adjudge the said James M'Ewan, M'Dowal Pate, or Peat, and John Connelton, all and each of them, to be outlaws and fugitives from his majesty's laws; and ordain them to be put to the horn, and their whole moveable goods and gear to be escheat and inbrought to his majesty's use, for not appearing this day and place, to underlie the law for the said crime of administering of unlawful oaths, as they who were lawfully summoned for that effect, several times called in open Court, and thrice at the door of the Court-house, yet failed to appear as said is.

(Signed) AD. GILLIES, P.

No. II.

COPY—Letter addressed " Hume Drummond, Esq. Advocate, Edinburgh."

Edinburgh Castle 31st March 1817

SIR,

After consideration I can see no way that wife can be informed how she is to act but by your writing Mr Salmon giving him instructions and by me writing at sametime to her to call upon him and attend to what he tells her to do you must cause Mr Salmon to state to her that I was under the necessity of acting in the manner that I have done and to shew her the danger that she is in to stop about Glasgow and that I request her to go out by the mail to Kilmarnock and then walk to Symington to my fathers and after stoping there a few days to go down to Irvin and stop there in my Sisters a night and next day walk to Saltcoats where she must take a room for herself and live there till that I send for her as also in Saltcoats she will be more Comfortable beside her mother Brothers and Sister than in any other place and that she is to write to me as soon as she reaches my fathers but Sir I must also state that it is needles to send her away without the means of support as my ffather is an old man and has no income but his Pention as well her mother is a widow and is sustained by a son who lives in the house and he being a weaver they cannot but be poor and she has not the same opportunity of earning a shilling in Saltcoats as in Glasgow and weakly constitution, and in the situation in which she is at present will not admit of labourious work as also she cannot remove any of the furniture without paying the house rent that sum being only L1. 3 which I owe to the Laird of house rent having paid him the last half years rent and 1s. more—I owe him L1. 10 of loom rent at Whitsunday that is a thing that has no concern with the House as it was taken seperatly and if the house rent be managed tell Mr Salmon to be sure and order her to give it in nam of house rent or do not give it at all and that she must have all the things upon the Saltcoats carriers cart upon friday at furthest and be off herself upon saturday Mr Salmon at same time writing a letter by post the night before the things goes away to William Archibald weaver in Saltcoats sta-

ting that the furniture is coming with the carriers and that Martha his Sister is gone to my fathers but that she will be there in a few days (An expression is here omitted as relating to third parties)

I remain Dear Sir yours
most respectfully
(Sig^{d}) JOHN CAMPBELL.

(P. S. to the foregoing letter.)

I wrote the report of that meeting on the 31st and 32^{d} page of my declaration now Sir if you possitivly do not see a way for me to escape out of their hands I would request it of you as a particular favour that you would serve me with an Indictment even although that I have criminated myself as I would rather die by the hands of the executioner than by the hand of an assasin as it would not be a ball through the head or body that would satisfy but would employ every kind of torture that conveniency would allow or that malice could invent Yours &c
(Sig^{d}) JOHN CAMPBELL

(The foregoing letter was inclosed and transmitted in the following letter from Mr Drummond to the Procurator Fiscal at Glasgow)

Edinr. April 1 1817

SIR,

The inclosures will explain themselves.* We are certainly bound to insure the woman's personal security, and in order to effect that, you may cause her to be sent off to Ayrshire by such mode of conveyance as the situation of her health renders necessary, supplying her with the means of travelling and subsistence of which she seems totally destitute. As to the house rent and furniture it is impossible to say any thing. Campbell has been promised such measures as are necessary to secure his personal safety, and that of his wife, without which it is impossible to expect that he should give an unbiassed evidence, or indeed any evidence at all.—Farther he must be left in the situation of every other witness. I remain

SIR
Your most obedient servant
(Sig^{d}) H. HOME DRUMMOND.

Mr George Salmond
Procurator Fiscal Glasgow.

* The other inclosure, was a letter from J. Campbell to his wife.

P.S. I have heard nothing of Campbell's wife having arrived here. Is it not a little awkward for you to be seen about her house? I mean *on her account.* But you know best.

COPY—Note addressed "To the Sheriff of Edinburgh," accompanying some additions to John Campbell's Declaration.

SIR

Having neglected what I have here wrote at the time of writing my narrative I considered it prudent to write this as an addition to my former narrative on account that I would feel myself very embarassed if that these omissions were not made known to the Crown Counsel till I made them known when upon oath before the Court—and for this reason I hope you will have the goodness to forward it to the Crown Council by so doing you will much oblige y^r mo^t ob^t ser^t

(Sigd) JOHN CAMPBELL.

COPY—Letter addressed "H. H. Drummond Esq Advocate Edinburgh."

Edinburgh Castle 27th June 1817

SIR

necessity impells me to make you acquainted with my present wants and at same time to crave your assistance in getting my distress in some measure lessened they are in number three two of them are entirely personal and the third concerns both my wife and me the last *of which* causes me a great deal of *uneasiness.* and shall therefore take the freedom to state them seperatly which is as follows

My shoes are in such a situation that they do not serve to keep my feet of the ground so that my stockings are in a great measure destroyed and in a few days the want of shoes will leave me without stockings

my trousers are also in that situtiion that for these some weeks I could not put them on as they were become unfit to serve there design in any sense which caused me to wear a pair of Breeches the cloth of which cost me 32s. pr. y^d. a very unfit article for every days wear they are fast changing appearance which will render me soon destitute of clothing.

I now come to the last of the three and the one that

concerns me most I informed you before of my wife being Pregnant and of having been in a bad state of health these some years by past I have now to add that I believe she is arrived at that period when that a wife has a right to look for the most tender care—but what must her situation be her husband a prisoner her friends poor who has the heart to assist a person in distress and thus render'd unable to give her attendance when needed the credit of every poor man destroyed by the badness of the times add to this the recolection of having been six days badly with her first child—and to this a Doctor without the view of pay for his labour is seldom known to give his assistance with these prospects I think her misery nearly compleat and my reflections cannot be thought to be very pleasant.

I hope Sir you will excuse my freedom it is very disagreable to my feallings to be forced to this alternative at this time.

Your consideration of the above will greatly
Oblige your most Obt. St.
(Sigd)
JOHN CAMPBELL.

It is believed that the Jailor furnished John Campbell with one or two articles of dress as is usual with prisoners under similar circumstances, and which, he informed Campbell, before delivering the letter, could be done without writing to any person. No answer whatever was sent to the letter, either in writing or otherwise.

Lately Published,

And Sold by MANNERS AND MILLER, *and*

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